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WISCONSIN REPORTS
136

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MAY 8 — NOVEMBER 10, 1908

FREDERIC K. CONOVER
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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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(Until July 1, 1908)
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(From July 1, 1908)

Attorney General - - FRANK L. GILBERT

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IN MEMORIAM.

GABRIEL BOUCK.

On the 5th day of June, 1908, Mr. Charles Barber of Oshkosh addressed the court:

May it please the Court:—Upon the death of GABRIEL BOUCK a committee of the Winnebago County Bar Association presented a memorial to the circuit court for that county, and by direction of the Bar Association I present the same today to this court.

Memorial of the Winnebago County Bar Association.

GABRIEL BOUCK, one of the pioneer members of this bar, soldier, and legislator, is dead. For more than half a century he was an active practitioner of this court, and it is fitting and proper that we should meet here and pay tribute to the memory of one who for so many years was recognized as one of the eminent members of our profession.

Admitted to the bar in 1849, he began his labors at Oshkosh, in this county, and down to the time of his death he remained one of the prominent lawyers of the state of Wisconsin. Mr. BOUCK's career at the bar in many respects was a remarkable one. Almost on its threshold he was elected attorney general of the state, and with the exception of those years devoted to his country's service during the Civil War his life was spent in the courts of our state. Mr. BOUCK was a man of marked individuality. His personality bordered upon eccentricity. Upon all subjects he had the most pronounced ideas, and was ever fearless in expression of his convictions. Original in thought, self-reliant, aggressive to the last degree, industrious, loyal to his clients and ever zealous in their cause, he was for many years recognized as one of the ablest lawyers of the state.

His name is associated with much of the important litigation of Northern Wisconsin, and for many years he was one of the familiar figures in this and the other courts of our state. Mr. BOUCK was a man of unquestioned honesty and integrity, and beneath a rough exterior had a kind heart. The history of his life records many acts of kindness towards his fellow members at the bar, who never hesitated to go to him for advice and assistance. Mr. BOUCK was not only a lawyer, he was also a legislator, and some of the important legislation of our state is due to his efforts. He was a member of

the Assembly in 1860 and 1874, and was elected to preside over that body during the latter year. He was a member of Congress two terms from the Sixth Congressional district.

His record as a soldier was a most honorable one. In 1861 he organized Company E of the Second Regiment, Wisconsin Volunteers, and after the battle of Shiloh he was commissioned as colonel of the Eighteenth Wisconsin. He reorganized that regiment and commanded it during the next two years.

Mr. BOUCK filled all these high positions with honesty and fidelity, and never in his whole public career was there ever cast upon his name a suspicion of official corruption.

Resolved, that we, the members of this bar, mourn his loss, and respectfully request that this memorial be spread upon the records of this court, and that the same be also presented to the supreme court of this state.

CHARLES BARBER,
C. D. CLEVELAND,
MOSES HOOPER,
A. E. THOMPSON,
JOHN W. HUME,
Committee.

Mr. Barber then spoke as follows:

May it please the Court:—I was instructed to present to this court the resolutions adopted by the Bar Association of Winnebago county upon the death of GABRIEL BOUCK of the city of Oshkosh. In these resolutions there is nothing fulsome, and to some ears they may sound cold and severe. They are, however, just what Mr. BOUCK would have wished them to be—truthful, frank, and sincere. To this tribute, just read by me, of his fellow members at bar, I wish to add my own tribute of respect in memory of a great lawyer with whom for thirty years my relations were very close. To my mind there can be no higher honor in store for the lawyer than to have at the end of his life the tributes of bench and bar as to his worth recorded in yonder book. To some there may be other temples of fame more alluring, but to the true lawyer what place could be more attractive than the scene of his labors, in which to have preserved the memory of his good deeds and achievements? What tablet more appropriate and enduring than the Reports of this court, in which are written, side by side with the story of his daily struggles and labors, the generous eulogies of his brother attorneys and the sincere tribute of the court before which for many years he appeared?

Upon the walls of this Temple of Fame, so dear to every lawyer, GABRIEL BOUCK won a prominent place. Born at the little hamlet of Fultonham, Schoharie county, New York, December 16, 1826, of sturdy German stock, the son of William C. Bouck, at one time gov-

ernor of that state, it might be said that he was reared in the atmosphere of the law. He was graduated from Union College in 1847, and commenced the study of law in the office of Daniel S. Dickenson, a prominent lawyer of Binghamton, New York. In 1848 he came to Milwaukee and read law in the office of Finch & Lynde of that city, and was admitted to the bar the following year. He immediately removed to Oshkosh, at once commenced the practice of his profession, and there actively continued the same down to his death, which occurred, after a short illness, February 21, 1904.

Mr. BOUCK was one of the prominent attorneys of the state before I began the practice of the law. In 1857 he was the Democratic candidate for attorney general, and held the office during the years 1858 and 1859. He served in the Assembly in 1860, and in 1864 he made a gallant but unsuccessful run for Congress in the Oshkosh district against Philetus Sawyer. In 1874, the year I first met him at the bar, he was at the zenith of his reputation. His fame at that time was national. His military record was fine, and in the earlier part of the year he had been Speaker of the Assembly. At that session of the legislature many laws were enacted which attracted attention beyond the borders of our state, and it was known that many of them were, in part at least, the handiwork of the Speaker. In the fall of that year he made a phenomenal run for Congress against A. M. Kimball, but was beaten by a few votes. In 1876 and 1878 he was elected as representative to Congress from his home district, but was defeated in 1880.

It was said that Mr. BOUCK was desirous of being governor of his adopted state, as his father had been governor of New York. His name was frequently mentioned for this high office, and in 1890 he was an unsuccessful candidate before the Democratic convention, being beaten by a few votes for the nomination. Had he been the standard bearer of his party that year, this ambition to emulate his father would probably have been gratified.

During the many years that we practiced together at the bar I came to know and understand Mr. BOUCK, to appreciate his many good qualities, and to overlook his mannerisms and eccentricities. He was a great lawyer, wise in counsel, strong in the trial of a case, loyal to the interests of his clients, stubborn and aggressive to the very last. He loved his profession, and was free from any taint of commercialism in its practice, going almost to an opposite extreme in this regard. A history of the litigation in which he was engaged would show that he was generally found fighting the battles of the weak against the strong. The poor and the needy, if they had a good cause, always found in him a warm and ready champion, and no foe was too powerful or formidable for him to attack in their behalf.

The features of Mr. BOUCK's character were cast in a rough mold,

but he had beneath the mannerisms of speech and conduct a kind heart. He was no hypocrite and he detested shams. He prided himself in being genuine, blunt, and outspoken. To his friends he was especially loyal, and to his brother lawyers he was always generous, sympathetic in their troubles, and his purse was ever at their command.

For fifty-five years he was known as one of the prominent lawyers of Northern Wisconsin, and for half a century he was a familiar figure in this court. His name appears scattered through a hundred volumes of our Reports. In active practice almost to the day of his death, he died, like an old warrior in his armor, upon the battlefield.

I regard it as one of the pleasures and honors of my career as a lawyer that I was associated with him in the last great case of his life, and that in *Danforth v. Oshkosh* [119 Wis. 262], the public library case, we stood together at the bar of this court and successfully contended for principles which we both thought were right.

Colonel BOUCK had some traits of character which were very high and which were worthy of emulation. He was a man of sterling integrity, of scrupulous honesty in money matters. He despised anything mean in business and disdained to take advantage of another for the sake of mere gain. He was always fearless and outspoken in his condemnation of corruption or dishonesty in any form. He passed through several eras of great corruption in public places with his reputation absolutely unsullied. He was an active factor in the politics of the state during that loose period nominated as "the era of the forty thieves," yet no breath of scandal was ever uttered against his good name.

During the Civil War he held important commands, and, while peculations were the order of the day, the accounts of Colonel BOUCK were rigidly correct. In every office of public trust that he ever held his reputation for integrity was absolutely unquestioned. He seemed to have gone through life in this regard absolutely above suspicion. In his political wars his friends boldly called him "Honest GABE BOUCK," and challenged the world to gainsay him this title. No enemy, political or otherwise, ever disputed it. Mr. BOUCK, like his father before him, was in politics a Democrat. With Colonel BOUCK, however, principle and country were above party. In the Barstow-Bashford contest he turned his back upon his party because he believed it to be in the wrong.

In 1860, while party strife ran high, Fort Sumter was fired upon. The heart of the nation was stirred. The drums beat "To arms!" and GABRIEL BOUCK, the Democrat, lawyer, and legislator, was the first in his city to respond. Obtaining a captain's commission, he at once raised a company of volunteers and led them to the front as the color company of the famous Second Wisconsin Regiment. He rose

to the rank of colonel, and his services were of the most distinguished character.

In his opinions Colonel BOUCK was uncompromising, and it is safe to say that the courage of his convictions frequently prevented his advancement in politics and in the army. He was no time-server, and could not well brook restraint or discipline.

For many years of his life Mr. BOUCK was a constant reader, and upon all of the questions of his time he was a profound thinker. He used to say that he belonged to a past generation, and many were wont to designate him as "an old fogy." As a matter of fact he was both behind and in advance of his age. In manners, habits, dress, and personality he belonged to the past. On public questions he was not only progressive, but was a quarter of a century in advance of his day. To my knowledge, much of the legislation, many of the reforms adopted by both parties of today, were advocated by Mr. BOUCK thirty years ago. In his blue coat with brass buttons, in his speech, you were reminded of the lawyer of fifty years ago. In practice he always used a statutory form of deed, and never went farther back than the New York Code. He was wont to talk about and dwell upon the virtues of the founders of our government. But GABRIEL BOUCK was known as the father of the "log lien law," the "valued policy act," and other pieces of radical legislation.

In summing up his character I have been constantly reminded of the noble words of Henry Grattan in his eulogy of the elder Pitt, where he says: "The Secretary stood alone, modern degeneracy had not reached him; original and unaccommodating, the features of his character had the hardihood of antiquity." I institute no comparison between the character and lives of these two men, but I unhesitatingly say that in the death of Colonel GABRIEL BOUCK the state lost an eminent attorney and a man in many respects original and great. He was among the last of those noble pioneers, empire builders, who devoted their lives to making Wisconsin the great commonwealth that it is. Mr. BOUCK holds an unique place in the history of our state. Had he been a little more accommodating, a little more complaisant, he might have gratified higher ambitions and have been of greater service to the state. These things he could not be because he was GABRIEL BOUCK. Just as he was, he was my friend; just as he was, I give to his memory this tribute.

Mr. John F. Kluwin of Oshkosh then said:

May it please the Court:—On this occasion I fully realize the inadequacy of mere words as a medium for the portrayal of the man I knew as GABRIEL BOUCK. I knew him as well as it was possible for youth with its inexperience and limitations to know and appreciate such a character as his. Associated with him during the last fifteen

years of his eventful life, as a student and as a lawyer in his office, I was made to understand that real success must have for its foundation hard work. It was by hard work, profound thought, serious reflection, and constant application that he succeeded in accomplishing results that won for him the honor and respect of those who did not claim his friendship and also the admiration of many who did not know him personally.

Saturday afternoons it was his practice to suspend work, assemble the clerks and the members of the firm, to whom he delivered a weekly lecture, or, as he termed it, "commanded" us to "listen to the voice of wisdom." These talks took a wide range, including discussions of current questions, analyses of public men, past and present, dissertation upon the science of government, history, moral philosophy, and law. He delighted in quoting the sayings of Franklin as found in Poor Richard's Almanac, and ever tried to impress upon us the idea that a young man must "Begin at the bottom of the ladder and work up" and that "No capital is so good as honesty." I doubt if any university in the land today affords its students a course of lectures as rich in food for thought and as full of inspiration as were these simple, homely talks that he was pleased to have us refer to as "Bouck's Philosophy."

To those who thought of "BOUCK" as uncouth and illiterate these discourses would have been a revelation. Here he was courteous, kind, and considerate, and on these occasions he showed that he was familiar with the history of human progress and conversant with the ideas, the theories, and the philosophy of the great thinkers and writers of all the ages. At these weekly gatherings he would unbosom himself to those about him. Here he most thoroughly enjoyed himself. Here we saw the real GABE BOUCK.

He observed his long office hours with marked punctuality, and toiled incessantly. Possessed of a great capacity for work, he could not tolerate slothfulness in those about him. He never slighted the smallest detail of his work. To every case he undertook he gave the same painstaking care. No just cause was too insignificant or trivial for his attention.

A leader in his profession for half a century, he lived his long and useful life and died misunderstood. It was given only to a comparatively few close friends to really know the man GABE BOUCK concealed. They knew him; others could not.

Of him it can most fittingly be said: "He was a man, take him for all in all, we shall not look upon his like again."

On behalf of the court, Mr. Justice KERWIN responded as follows:

My personal acquaintance with GABRIEL BOUCK commenced when I began the practice of law in Winnebago county in 1875, and contin-

ued until the time of his death, and I think I am justified in saying that I knew him intimately and well.

His professional career covered the greater part of Wisconsin's judicial history. His first case in this court will be found in the 6th volume of the Wisconsin Reports and the last in the 119th. Two cases in which he appeared as counsel are reported in the 122d volume, but he died before they were argued. Thus it will be seen that the cases which he argued will be found embraced within a period covered by 114 of the 131 volumes of Wisconsin Reports now issued. He was from the time I first knew him until his death one of the leading lawyers of the state. Having been elected attorney general in 1858, and ably serving in that capacity for one term, he became interested in and identified with the judicial history of the state at an early date, and continued to aid in the settlement of many important questions coming before this court. The record of his professional life in Wisconsin, covering a period of upwards of fifty years, affords ample evidence of his eminent ability. He was a profound lawyer, well grounded in the fundamental principles of law and equity, and thoroughly devoted to his chosen profession. In the discussion of legal questions he went to the heart of the subject, avoiding technicalities and legal quibbles. He had a great veneration for the law, which he regarded as the result of the labor and struggles of mankind for years. He thought the law was the perfection of human reason, but sometimes grumbled about the administration of it. His ideals of a lawyer's duty were high; he believed that professional duty ably, faithfully, and honorably performed is a lawyer's true glory, and in the practice of his profession maintained these ideals. His entire life after his admission to the bar, aside from the time he served in the army, state legislature, and Congress, was devoted to his profession with unremitting toil. It was his constant practice to be at his office between seven and eight o'clock in the morning and remain until six o'clock in the evening, with the exception of one hour at noon. This habit he pursued all his life. Although his time was mainly devoted to the study of law, he was well informed upon all subjects and was a constant reader of the best books in general literature. In short, he was a well informed man. He had very pronounced ideas upon all subjects, which he never hesitated to express plainly and vigorously.

He was a true friend of young men, liked to associate with them, and delighted in giving them good advice and helpful assistance. He particularly impressed them with the necessity of being honest, industrious, and practical, maintaining forcefully that these qualities were the result of habit. Underneath a rough exterior he possessed a kind and sympathetic heart. His impulses were noble and generous. He loved his friends and was ever true to them. Gratitude was a predominant element of his nature. He was unique, eccentric, original in thought and action, of marked individuality, and

possessed a mannerism peculiar to himself. He was, to use a familiar expression of his own, a "plain, blunt man." He detested sham and hypocrisy. He had no patience with the mere pretender and despised the man of little learning and much pretense. He was also charitable, giving freely to the needy without ostentation or display, but in a way best calculated to relieve their suffering and wants. Nor was he mercenary in his profession, often contributing his time and ability to his clients regardless of pecuniary reward. When once retained, his loyalty to his client never wavered, even though he knew he might never receive compensation for his services. He loved to contribute what he could to the administration of justice, and regarded it his duty to do so under all circumstances.

After having practiced law with great success for upwards of fifty years he laid off his armor with no blemish upon his professional record, no stain upon his professional name. His honesty, integrity, gratitude to friends, and loyalty to clients were never questioned. In the midst of his labor he was stricken down. He left an unfinished brief in his office, retired to his rooms a sick man, thence to his sick bed, and never rallied, but constantly declined in courage, health, and vigor, until he finally passed through the night of death to the eternal morning.

The frequency of these memorial services reminds us of how rapidly the pioneer lawyers of the state are passing from the bar of this court to the bar of the final Judge, before whom all must appear and render up the record of their lives.

The name of GABE BOUCK will long be remembered in his adopted city and other parts of the state where he served his clients so faithfully and well.

The court fully indorses all that has been so well and fittingly presented in the memorial and addresses. They will be entered upon the records of this court and made permanent.

JOHN WINANS.

Mr. William Smith of Janesville presented the following

Memorial of the Rock County Bar Association.

At a meeting of the Rock County Bar Association, held immediately following the announcement of the transition of the Hon. JOHN WINANS, the undersigned were intrusted with the duty of preparing and presenting to the circuit court of Rock county and the supreme court of the state, for permanent preservation on the records of such courts, a memorial that should testify in some measure the high regard and devoted friendship of the members of the bar, of which

our friend had been so long a conspicuous leader, ever possessing its highest esteem, entire confidence, and unqualified admiration.

Mr. WINANS came to us from New Jersey, his native state, in the spring of 1857, then in his twenty-seventh year, having been born in Vernon, Sussex county, on the 17th day of September, 1830. His father and mother, William R. Winans and Katherine Simonson Winans, were the parents of eleven children, of whom John Winans was the sixth. His death occurred at Janesville on the 17th day of January, 1907.

His preparation for the bar was careful, diligent, and studious. He had the advantages to be obtained in the schools of his state and the tutorship of several of its best lawyers, so that when he came to our state he had already been admitted to practice in all of the courts of his state, and was thoroughly grounded in the fundamental principles of law and fully prepared to enter upon the successful and brilliant career which has adorned the bar of our state. The grandfather and father of JOHN WINANS were lawyers of learning and ability, though the father devoted the major part of his active life to constructive work connected with rail transportation.

The subject of this memorial was a man of the most sterling character and unquestioned integrity. He was a formidable antagonist, but one who never attempted to attain an end by unworthy means. He was sociable and amiable in disposition, true to his friends, tolerant of the weaknesses and opinions of his fellow men, yet as he had no place in his own nature for either subterfuge or dishonesty, the exhibition of these qualities in others excited his lasting contempt. Without egotism, he yet had a consciousness of the possession of mental power, which gave him poise and self-reliance. He was not without ambition, but he was never tempted to resort to meretricious arts to attain his ends. His convictions governed his actions. To him they were sacred, and he had no inclination to barter them for worldly success. Whatever success came to him, came as the result of his own merits.

In politics he was a Democrat. His Democracy was based on the conviction that that government is best which is founded on the will of the whole people. He ever retained the confidence, respect, and esteem of his party, which gladly bestowed upon him such honors and positions as it had in its power to give. In 1874 he served his district and state as a member of the Assembly, where he acted as chairman of the Judiciary Committee and had a prominent and influential part in the legislation of that year. This was an epoch-making session. The legislature of that year enacted a law providing for the effective regulation of railway corporations. This was legislation practically new and was vigorously attacked as unconstitutional, but was sustained by this court in an opinion by Chief Jus-

tice RYAN, an opinion that added materially to the fame of that great jurist. It may truthfully be said that the legislation on that subject and the opinion of Judge RYAN were models largely followed by legislative bodies in enacting laws and by the courts of both state and nation in construing the different enactments. Mr. WINANS, subsequently to 1874, served three terms as a member of the Assembly, always taking a conspicuous part. He was in 1882 elected to Congress from the old First district, overcoming a regular opposition majority of more than five thousand.

To us, his fellow members of the bar, Mr. WINANS' career as a lawyer naturally appeals with greatest force and interest. It was in this relation that he came closest to us and in which we knew him best. His career as a lawyer is one in which his brothers of the bar take just pride. Many of his contemporaries, able and distinguished men, had preceded him to the land beyond the grave. His merits as a lawyer during his active career were brought into sharp comparison with that of men foremost in their profession, and, without invidious distinction or disposition to decide between great jurists, it is fair to them and but just to him to say that he never suffered by the comparison. Few men had a broader knowledge or firmer grasp of the principles of law than he. Location forced him into a general practice. In smaller cities and in rural communities, few practitioners find that there is sufficient business to justify them in confining themselves to a particular branch of the law, yet most lawyers are more especially adapted to certain departments of the law than to others. Some prefer and are at their best at office work, others better fitted for the equity branch, still others for jury trials. Many brilliant lawyers find their sphere for their best work in the criminal law. Mr. WINANS' claim for special distinction rests in the fact that he was at home in each and every branch of the law, not as a mere dabbler, but among the foremost in whatever branch he happened to be engaged. The records of this and other courts will show that he has successfully conducted a large number of equity cases, an equally large or larger number of cases at law, and a very large number of criminal cases. In arguments before the courts, supreme or circuit, he was logical and exhaustive, always grasping the questions of law with a clearness and understanding that greatly aided the courts to a proper solution of any question presented. As a trial lawyer in jury cases he had few equals, an opponent to be dreaded and an associate of the greatest assistance. He had the faculty of putting his case before the jury in a manner which gave it the strongest aspect. In the matter of cross-examination, that most hazardous of any undertaking a lawyer has to contend with, it may be said of Mr. WINANS that he was more successful than most men, and generally escaped from the conflict without having injured his cause; and this we regard as high praise. In his addresses to the jury he was clear and persuasive, most earnest and emphatic; and while he

was not a rhetorician and could hardly be classed as a great orator as that term is generally used, yet he had the faculty of appealing to juries in a manner to secure and hold their closest attention and generally to convince their judgments. Our brother's practice was extensive as well as general and his name is associated with many of the most important cases, civil and criminal. His appearances before this court have been so numerous and his arguments so forceful that it may well be said that his assistance in elucidating and construing the law, and his valuable services as a legislator in the enactment of laws, justly entitle him to a high rank among the very able lawyers who have graced the bench and bar of his adopted state.

A. A. JACKSON,
WM. RUGER,
WM. SMITH,
Committee.

Mr. William Ruger of Janesville then addressed the court and bar as follows:

May it please the Court and Gentlemen of the Bar:—The tribute to the memory of our deceased brother, JOHN WINANS, which has been presented by the committee appointed for that purpose, was drafted with the view of embodying in plain words a just tribute to the character of our deceased brother as a lawyer and as a participant in the public affairs of the state and nation. It seems a sufficient tribute to his character as regards these aspects of his life; but, as a personal tribute, I desire to speak very briefly of his walk in private life.

During the later years of his life he was one of my next-door neighbors, and we frequently met in social intercourse which afforded ample opportunity for observing manifestations of his inner nature. To sum up his characteristics in these particulars, I will say that he was comforted and strengthened by his faith in and reverence for his Heavenly Father, and that he possessed that degree of faith which is common to men in general who possess strong and reasonable minds and good hearts; that he loved the members of his family with such fervency as is to be expected of a husband and father possessing a strong and manly nature; and that by his uniform courtesy and kindly demeanor he endeared himself to all of his fellow men with whom he came in close contact.

Mr. Justice DODGE, for the court, responded:

The memorial to which we have just listened presents a completely typical career of the American lawyer. With a sound though not collegiate education, Mr. WINANS came to Wisconsin in its early days, became a member of one of its thriving communities, there took root, grew and flourished through half a century, then passed

away, having won the confidence and regard of the associates of a long and active life. He early equipped himself with the essential implements and weapons of his profession in acquiring the fundamental principles and rules of our jurisprudence, and then gained a skill and dexterity in the use thereof which soon placed him in the front ranks of the law militant. Like a knight in the days of chivalry he went ever panoplied *cap-a-pie* ready for instant battle. Called often to trial of case after case without opportunity for preparation, he sat through an entire jury term meeting all comers and all exigencies with no resources but such as he carried within him. Those he found sufficient to assure full protection to his clients' rights against assault by even the greatest champions of the court room. A deep and sympathetic student of human nature and human motives, the jury was his favorite forum, and in presence of his forceful skill became in verity the palladium of his clients' rights.

He was above all things an advocate, and an advocate of dominating persuasiveness and torrential force. No influence is more potent for that establishment of ideal justice than contention between strong partisans each straining to turn the scales in his favor. That way comes forceful suggestion and full consideration of the reasons and the perils of decision either way upon a question of private right or general principle. So, and so only, can be set solidly, in harmonious proportion, the pillars of that temple of justice which Webster declares to be the surest foundation for social security, general happiness, and the improvement and progress of our race.

But Mr. WINANS' services to his fellow men were not confined to this professional field. He was often called to serve the public, though differing politically with the overwhelming majority of his community. As a legislator both of state and nation, and in important municipal offices, his excellent abilities were laid a sacrifice on the altar of public duty.

The keynote of his moral character was fidelity to his client and to his own integrity. With this, aided by good though not transcendent intellectual ability, he won, what every lawyer so equipped must, the warm regard and high confidence of the community where his long life was spent. He did his full part, perhaps unconsciously, toward human progress, free government, and the rights of man.

HERBERT W. CHYNOWETH.

Mr. Rufus B. Smith of Madison then addressed the court as follows:

May it please the Court:—The solemn duty has been delegated to me by my brethren of the Dane county bar to announce to the court

in this formal manner the death of our brother, HERBERT W. CHYNOWETH, which occurred at his home in Blooming Grove, October 14, 1906.

The melancholy fact of which I speak has been known to and felt by your Honors as men, as it has been felt by all of us, but the usages of our ancient profession seem to justify some formal recognition of the event, so that something in relation to the work of our brother may be perpetuated in the records of the court in which he practiced.

The bar of Dane county, soon after the death of Mr. CHYNOWETH, adopted some resolutions expressive of their appreciation of him which I will now present:

Resolutions of the Dane County Bar Association.

Resolved, that as a further tribute to the memory of our deceased brother, Hon. HERBERT W. CHYNOWETH, we here declare our appreciation of his great learning in the law, of his industry in illustrating its principles, and his skill and accuracy in applying them to the important cases he was called upon to consider. He was an able and successful lawyer, an active and intelligent citizen, and contributed much by his learning and energy to the development of the jurisprudence of the state and to the forwarding of the prosperity it has enjoyed; and we recognize in his death a distinct loss, not only to the bar, but to the people generally of our commonwealth.

Resolved, that we extend to his family our special and continued sympathy in the loss they have sustained; that the memorial which has been here presented be spread with these resolutions upon the records of the court, and a duly authenticated copy be transmitted to his widow."

In addition to the presentation of these formal resolutions, a few words relative to Mr. CHYNOWETH's personal and professional history may not be out of place.

Mr. CHYNOWETH was the son of Thomas Chynoweth, long a resident of this city. He was born at Nunda, New York, August 29, 1848. When a little over six years old he came to this city, which continued to be his home until he removed to a farm contiguous to the city shortly before his death. He graduated from the University of Wisconsin with the class of 1868. He was admitted to the bar by the circuit court for Dane county, December 3, 1869. Within a short time he became a member of the firm of Orton, Keyes & Chynoweth, his partners being Harlow S. Orton, who subsequently became chief justice of the supreme court of Wisconsin, and Colonel E. W. Keyes, who has happily been spared to us, and who enjoys the distinction of being the senior member of the Dane county bar. After the election of Judge ORTON to the supreme court in 1878, the firm continued as Keyes & Chynoweth.

In 1878 he was appointed assistant attorney general of the state of Wisconsin, and continued in that office under succeeding attorneys

general for nine years. After 1887 he devoted himself to private practice, and with the exception of one or two partnerships, which lasted only for a short time, he was alone.

The professional life of our brother covered a period of thirty-seven years. Such a stretch of time is not long in the history of the world, but much can be done by the able and energetic lawyer in that length of time, and much was accomplished by Mr. CHYNOWETH.

He started, as all lawyers have to start, at the bottom; but even then, in dealing with the matters of less importance, such as are usually intrusted to the care of the junior member of a large firm, he showed great ability and gave a promise of that strength which became his in after years, and which he so abundantly exhibited when he stood, and was worthy to stand, as the antagonist of the ablest lawyers the state of Wisconsin has ever produced.

After commencing to practice alone, he for several years devoted much attention to insurance law. The Reports bear witness that many important cases along this line were intrusted to him, and that many of them settled questions before that considered doubtful, and some of them have become leading cases. From the time when he ceased devoting special attention to insurance law to the time of his death, there was but little time when he was not engaged in some litigation, generally of state interest and always of great importance. No attempt will be made to enumerate all of it. Among these cases may be mentioned the suits against the ex-treasurers to recover interest on amounts deposited in the banks; the action relating to the Republican nomination for governor; the controversies between the state and the railroad companies in relation to *ad valorem* taxation; and the actions by the state to recover back taxes from the railroads. These were all matters of very great importance. No litigation in modern times in any of the courts has been more momentous. In this long line of cases principles have been settled which will be precedents for all time and on which the prosperity of the future must rest if it comes at all, as we all believe it will. We have heard much of the importance and fundamental character of some decisions in the federal courts, such as the *Dartmouth College Cases*, the *Girard Will Case*, and others, but none of them, in my judgment, are as important in any respect as these cases which have been disposed of in our own state.

In all this long line of litigation the questions were difficult. In many of them Mr. CHYNOWETH and his associates had to travel unknown and unmarked roads and explore unknown lands. They had behind them, it is true, the experience of the centuries and the great principles which have been established by the courts, but to gather them together, to extract from them their true meaning, and to apply

them to the situation with which they were confronted, was a task requiring indefatigable industry and conspicuous ability. The contentions in opposition to the views of the State were supported by lawyers of very great ability, to whom these and kindred subjects had been almost a life study. Nothing that could be done by them was left undone. It is all over now: Mr. CHYNOWETH is in his grave, time enough has elapsed so that we can clearly see what the contest was, and what it involved, and how it was fought. I think we are doing no injustice to any one when we conclude, as we do, that in those successive, fiercely fought legal battles there were none abler than he of whom we speak, none who battled more zealously for his contentions, and none to whom greater honor should be given for the beneficent results finally obtained.

Mr. CHYNOWETH was in every proper sense of the term a great lawyer. He was firmly grounded in the great principles which lie at the foundation of our jurisprudence. He was able to apply them to the solving of the problems that came to him for solution. He could with remarkable facility analyze the adjudged cases to which his attention might be directed, and could with almost unerring certainty estimate their value as authority. Moreover he was a very fluent and graceful speaker. His arguments, especially those addressed to the courts, seemed to me to be models, and I think he has made many which would not suffer by comparison with those that are preserved in the books as masterpieces.

He died all too soon. I said that all lawyers must start at the bottom. It is equally true that none reach the top. Our brother grew and expanded and broadened during the years that he was permitted to be with us. He was apparently just coming to the best years of his life when he had to stop. Had he lived to fill out the period of human life allotted by the psalmist with the additional decade sometimes given by reason of strength, it is not difficult to believe that he would have taken rank with the highest. He might not have reached the top, but he would have risen very high.

With all of his professional ability he had a keen sense of professional honor. He was always an honorable practitioner. He had no patience with anything which savored of chicanery or trickery.

I would not willingly indulge in any extravagant praise: I want to speak of him justly. No man at this bar had a greater dislike for sham and pretense than did he. He never wanted to pose for anything he was not. He had his faults: whatever they were they are buried with him. It is for us rather to remember that in him which was worthy of emulation and worthy of praise.

It is as a lawyer that his brethren best like to remember him. It is his career as a lawyer which will be looked up to by his successors and which will furnish to them incentives for great efforts and great

achievements; and yet we like to remember him as a man, a citizen, and as a friend. He had many qualities which made him useful to the community as a citizen, and those upon whom he bestowed his friendship had abundant reason to know that he was faithful, loyal, and self-sacrificing.

It seemed very hard to us that he had to go, just as he was coming to his best estate. It seemed very hard that the community should lose his services as a citizen and lawyer. It seemed hard that the friendship which had grown up during the forty years of intimacy should be thus ruthlessly severed.

The Almighty has his own purposes. Instead of complaining at his untimely death we shall do much better if we take to ourselves the lesson of his life and draw from it the consolation and inspiration of which it is so fruitful, and leave the rest to the Power in whose hands is the destiny of nations.

Mr. Justice BASHFORD, on behalf of the court, responded:

The memorial submitted on behalf of the Dane county bar has set forth so fully and in a manner so just and appreciative Mr. CHYNOWETH's ability as a lawyer, and his worth as a man and a citizen, that I can hope to add but little to what has already been so well said.

My acquaintance with Mr. CHYNOWETH began when we were classmates in the preparatory department of the Wisconsin University in 1863, and the friendship then formed continued until he was called from earthly associations. He graduated from the ancient classical course in 1868, and that he maintained a high standing for scholarship is evidenced by the fact that he was chosen valedictorian of his class. He had already formed the purpose of becoming a lawyer, and considered a liberal education as the first step in preparation for a successful career. Upon graduation he entered the law office of Hon. E. W. Keyes, and engaged diligently in the study of the law, having the use of one of the best law libraries in the state at that time. Legal principles stated by text-writers he verified and fortified by the reading of adjudicated cases in order to comprehend their full meaning and their practical bearing. He was admitted to practice in this court April 2, 1870, and at once became a member of the firm of Orton, Keyes & Chynoweth and engaged assiduously in the active practice of his profession. This association was especially helpful to him by reason of the standing and ability of his partners and the opportunity it afforded for immediate practice in the office and in the court room, and especially as it gave him the continued use of a large library, with which he had already made himself familiar. The success of a young lawyer must depend in a considerable degree upon the use he makes of books. A good library is an inducement to study and application, a preventive to waste of time in idle pursuits and to loss of opportunities that may never be recov-

ered. Mr. CHYNOWETH was singularly fortunate in the early years of his practice, in his own office and as assistant attorney general, in having ready access to the legal learning stored in books, and being driven to original investigation for the preparation required in meeting his professional engagements. During that period he devoted himself diligently to the study of adjudicated cases, and thus grounded himself in legal principles and laid the foundations for professional success.

Hon. Harlow S. Orton, the senior member of the firm, was in 1878 elected to a position on this bench, where he served for the remainder of his life with signal ability and distinguished honor. At about the same time Mr. CHYNOWETH was appointed assistant attorney general, and continued for the succeeding nine years to discharge the principal duties of the office with great acceptability to this court and to the people of the state, and established a standing as one of the foremost lawyers at this bar.

To a cultured mind and to extensive learning in the law Mr. CHYNOWETH added a trained legal judgment. Learning, judgment, and courage are the essentials of success at the bar. Judgment is measurably a personal attribute, but it may be cultivated by reflection, improved by association, and strengthened by practical application. It implies an understanding of legal principles, their application to the given facts, and the adoption of the proper remedy to secure adequate relief. Without it professional practice is a mere experiment, often disastrous to the client's cause. To legal learning and judgment must be added courage to promptly adopt and enforce the proper remedy and to prosecute the cause with vigor to a final result. Timidity and procrastination are too often found in lawyers of eminent legal attainments, and are formidable stumbling blocks to professional success. Mr. CHYNOWETH possessed in a remarkable degree these essential qualifications for efficient service, and by close application was enabled to maintain a high standing as a lawyer in general practice.

The name of Orton, Keyes & Chynoweth first appears in our Reports in *Killips v. Putnam Fire Insurance Co.* 28 Wis. 472, argued at the June term, 1871. Mr. CHYNOWETH's last appearance in this court was in May, 1906, upon the argument of the case of *Chicago & N. W. R. Co. v. State*, 128 Wis. 553. For a period of thirty-five years he was a regular practitioner at this bar, and the one hundred volumes of our Reports from his first appearance to the last bear testimony to his learning and ability and of his devotion to the interests of his clients. The meager summary of the briefs and arguments of counsel in connection with the reported case does not fully disclose the ability and resources of a lawyer in presenting the cause to this court. Mr. CHYNOWETH invariably argued his cases, and he was one of the lawyers who could render material aid to the court

by oral argument. He was not confined to the printed brief, but was able to discuss any question suggested from the bench, and to remove objections and to clear up a doubtful question by the force of his reasoning or by reference to the law or to the facts. During the later years of his practice he was connected with cases as important as any that have ever come before this court for decision by reason of the questions involved and their bearing upon public interests. He was principal counsel in the action of *State ex rel. Cook v. Houser, Secretary of State* [122 Wis. 534], which determined the regularity of the Republican nominations for state officers in 1904; and as special counsel for the state he assumed responsibility for the litigation with railways relating to the *ad valorem* system of taxation and for the recovery of the amount claimed to be unpaid as license fees under the former statute. In these and other cases before this court he encountered a formidable array of legal talent, embracing the ablest lawyers in the Northwest, and fully vindicated the rights of his clients, and by his learning and ability maintained an established position among the great jurists who have honored the profession in this state. The results accomplished, measurably through his efforts, have established legal principles of the greatest magnitude and of far-reaching consequences, and will stand as a monument to his learning and ability and courage as a lawyer.

Mr. CHYNOWETH as a citizen held decided views upon public questions, but was not aggressive in asserting them. He was ready and willing to serve when called upon, but was modest in deportment, and never pressed his own claims for consideration. He never held a salaried office, except that of assistant attorney general, and was retained in that position term after term by reason of the valuable service he rendered the state. In 1892 he was appointed a member of the board of regents, and by reappointment held that office for six years, rendering valuable service to his *alma mater* and to the state as well. He was influential in the selection of Dr. Adams as president, and co-operated intelligently and earnestly with him in the measures that were adopted to place the institution upon the high plane it has since occupied as one of the great universities of the country. He participated in the dedication of the gymnasium, at that time surpassed by only one college building in the country devoted to athletics and physical training. He believed that athletic sports and exercises were necessary for the proper development of students, and co-operated with President Adams in securing the grounds for outdoor games and framing the organization and adopting the system of athletics that brought renown to his *alma mater*.

As a member of the legislative committee of the board of regents Mr. CHYNOWETH rendered valuable service in aid of liberal appropriations and in the adoption of a broad and generous policy by the

state towards its highest institution of learning. The erection of the new library on the grounds of the University, where it would be readily accessible to students and instructors, was a cherished object of President Adams, in whose views Mr. CHYNOWETH fully shared, although opposed by influential members of the State Historical Society. As a member of the committee acting on behalf of the regents he was influential in securing the passage of the bill by the legislature of 1895 for the location of this building on the lower campus and the making of a liberal appropriation for its early erection and completion. No other single individual was more constant and vigilant in his efforts or rendered more practical and efficient service in securing the adoption of this measure than did Mr. CHYNOWETH, yet he never asked any personal recognition therefor, but modestly insisted that others should enjoy the honor and distinction of serving on the board selected for the construction of the building. His services as regent were no less helpful in other directions, the mention of which must be forborne at this time. Mr. CHYNOWETH bore an honorable and important part in the upbuilding of the University, and the only reward he sought was the conscious sense of duty efficiently and faithfully performed.

During his fatal illness Mr. CHYNOWETH reclined at his home on the height overlooking the city and awaited the approaching end without fear and without complaint, secure in the love of a devoted family and in the confidence and esteem of his friends and associates; and thus he passed from earthly scenes and his life was sealed in usefulness and honor.

Heartily concurring in the sentiments of love and respect expressed for HERBERT W. CHYNOWETH by his associates of the Dane county bar in the memorial here presented, it is ordered that the memorial and this response be spread upon the records of this court as enduring proof of the high estimation in which he was held by those who knew him best.

CHARLES QUARLES.

Mr. George G. Greene of Green Bay then addressed the court:

May it please the Court:—The State Bar Association has caused to be prepared a memorial which I now have the honor to present, with a request that it be received and recorded.

Memorial of the State Bar Association.

CHARLES QUARLES began practice of the law at Kenosha in 1875, continued it there until 1888, and thereafter at Milwaukee until his

death on April 8, 1908, in the sixty-second year of his age. He graduated from the University of Michigan in 1868. In thirty-three years at the bar he was engaged in many causes in this court, in the federal appellate courts, and in courts of original jurisdiction. It is enough now to say that they held for decision more momentous questions than often fall to one lawyer to help settle, and that he gave to them uncommon powers of intellect and heart. We may fittingly pause and note and with professional pride long remember the great and good qualities which so wrought.

A lawyer can have no better title to distinction than from the impress of his character upon law. The greater part of our law, in volume and value, is made by lawyers. Infrequently, the agency is palpable and is history. Mainly, there are so many concurring forces—the contentions of counsel and the deliberations of judges in particular cases, and the force of precedent bearing the results of like controversy in other cases—that the exact part of this or that lawyer in the process is unassignable. We know, however, that the unwritten law is the product of these forces acting immemorially, still acting; and while we can seldom specialize the efficiency of any lawyer, on or off the bench, in this evolution, we know from the relation of cause and effect that it depends much upon character.

But character cannot be fully traced from its translation into work, without remarking the conditions of its activity. Mr. QUARLES won prestige at the bar with far less toil than is usually given for it. Physical frailty was a limit to his endeavor. He gave much time and effort without the profession, to civic enterprise and benevolent interests. He gave much to home, mindful of wife and children; let not the "winds of Heaven visit" one "too roughly;" was the instructor and companion of the others, analyzed their characters, and, on the resolution, projected their education and careers. He burned no midnight oil, disdained the proverbial jealousy of the law. We may marvel and admire but may not, safely, imitate. His achievement was possible by a rare union of mental and moral qualities of high order finely correlated.

Men dispute about where talent brightens into genius and genius fades into talent. The meanings of these words are too inexact to aid in estimating character. That genius is not "the capacity for taking infinite pains," as some one has said of it, we are confident; for we often see mediocrity, and sometimes stupidity, with that capacity. It may be said that the effort to produce what the world calls works of genius varies with the kind and degree of ability behind the effort.

Mr. QUARLES had quick apprehension, sound judgment, and strong will. He had a comprehensive memory—seldom joined to solid judgment. He acquired knowledge quickly, held it permanently, used it wisely and resolutely, with logic that was analytical or constructive as efficiency of argument required. He reasoned out the law of a

case for himself, using authorities sparingly; and such was his faith in the validity of his conclusions that he carried them into action without hesitation. He thus avoided much of the drudgery of practice. His wide learning, used with singular skill, confidence, and celerity, lightened and quickened every step of preparation.

He was more than intellectual. Public grief at his death, his love of home and family, of sunshine, lakes, and woods, his sympathy and benevolence, the note of fondness in the use of the name "Charlie" by so many; these and the genial tenor of all he said and did mark sensibility. His emotional nature complemented and ennobled his intellect.

"Bless'd are those
Whose blood and judgment are so well commingled
That they are not a pipe for fortune's finger
To sound what stop she please."

The courtesy of kindness made men like him; and affection is a mighty though subtle force in achievement. Feeling informed his speech with imagery. Art in convincing the understanding allows rhetorical embellishment. The force of an argument is most felt when the attention is fresh, and the graces of language serve to keep it alert. And so, judiciously, he used knowledge in new and ideal forms. He was eloquent in reasoning that pleased while it persuaded, by the apt choice of words, by poetic fancy, epigram, episode, humor, and story. His elocution was not noisy, but modulated to make sound help reason rather than distract it. His wit was ready and keen, but it always flashed near his argument, brightened and reinforced it, was itself argumentative. It was essentially kind. If, on provocation, it sometimes took the form of ridicule or sarcasm, it was not vulgar abuse but rebuke rested on fair text found in the controversy.

He had varied learning and much quaint information which often enlivened his conversation and addresses with agreeable surprise. The exercise of his high powers was marked by fidelity to duty and honor.

Many will "miss the sound of a voice that is still;" but remembering his splendid attainments and great services to the profession and the community, and the nobility and purity of the spirit immanent in it all, regret at his death is softened by gratitude that he lived. The great mystery "must give us pause;" but those who believe and those who doubt or deny the immortality of the creeds must agree that the activities of such a life live beyond the grave, not as transient fame, but as persistent, undying energies for good.

GEO. G. GREENE,
THOS. M. KEARNEY,
FRANK M. HOYT,
Committee.

Mr. Thomas M. Kearney of Racine then addressed the court as follows:

May it please the Court:—When invited to consider of the attributes of character and marked accomplishments of CHARLES QUARLES, the mind halts at the task which fondness and deep respect for the memory of the dead would impose, and in the becoming dignity and perfect eloquence of that silence which personal bereavement knows, it would direct us to his grave, there, with the stately oaks he knew as our witnesses, to nourish with the tear-drops which pride would not hide or manly strength suppress, the sod which in its June-time freshness robes his resting place.

While living and moving among us and doing his part in the daily work of life, CHARLES QUARLES endeared himself to all with whom he came in contact, and to those who enjoyed his closer confidence and friendship he became an almost indispensable companion, friend, and guide. The bonds of friendship and respect thus forged are not easily broken.

Whoever shall essay the work of outlining in but an imperfect way the attributes of character and the accomplishments of this professional friend and brother must choose the best of implements for his task, draw with delicacy, trace with accuracy and precision, execute with courage and a trained hand, and must present in the completed picture a harmony of light and of shadow, of strength and of tenderness, in becoming representation of the perfect man, the cherished work of God. For this was no passive character we here contemplate and in appreciation of which we humbly ask that the records of this court may forever speak. It was not molded to fit into its surroundings complacently, as the plastic clay accommodates its form to the wheel of the potter. The frail form of this friend was the residing-place of a great, fearless, independent power, moving of its own volition, reaching its own results, accomplishing its own purposes in its own inimitable way, unerring in its directness and its openness, strong and persuasive, soft and forgiving nevertheless, broad, varied, beautiful, complete.

In his relations with his fellow men, CHARLES QUARLES held no controversies with conscience. He stood for the right as he saw the right and comprehended it, manfully and without apology, and refused to follow unless the star of duty stood above the way.

Of the mind which reigned in dominion over the life ended, description fails and attempts at tribute lose potency. Alert, incisive, luminous, searching, quick in the discernment of the false or the imperfect, intuitively grasping the truth, with which it seemed to be in natural and constant accord, allured by the apt and the beautiful in literature, in art and in Nature, acquiring without seeming

effort, retentive of all that passed in review before it or transpired within its almost boundless zone, it became a great storehouse of all that was choicest and best, from which, with prodigal yet unassuming ease, this friend drew the choicest of materials to season a discourse, adorn an argument, illustrate a principle, delight an audience, overcome an opponent, or convince a court.

To this was added in him a command of language, a classical aptness of speech, remarkable for its purity and its excellence. He dressed his thoughts so fittingly, expressed them with so much of directness and of clearness, not as others do, but in his own engaging way dropping gems from his mental workshop here and there as fancy prompted him, to delight the hearer and allure men to him. It may truthfully be said of CHARLES QUARLES that he never suffered for an attentive audience, although in his modesty he seldom sought one.

In the praise and commendation of what was the right, in the little acknowledgments so pleasingly bestowed upon his friends, in the modest references to that family life where all was perfect in its trust and its simplicity, this man touched the finest chords of human sympathy with the hands of a master, and excelled in all of those delicate sentiments—the gifts of the mother to the character of the man.

In the denunciation of wrong and of the oppressor, the words came from his lips like the arrows of the archer aimed fair against the breast of evil.

As a lawyer he stood in the front rank of the greatest of his country. All who knew him in a professional way are pointing today to some instance of the breadth of his learning or the wisdom of his conclusions in some professional matter involving new and trying situations or the application of old principles to the rapidly changing affairs of modern life. Great problems attracted him. He enjoyed the consideration of new and difficult questions, and it may be fairly said that he seldom reached wrong conclusions concerning them. The story of what he accomplished in a professional way is written enduringly in the records of the courts of the land. In his professional work he was above the shadow of reproach.

To the young lawyer struggling for position he was a constant friend. In the work of the day he was a charming associate. In the courts where he so often appeared he was a dependable adviser and aid; in the family a model husband and father; in his relations to the state a perfect citizen; to his associates a true and steadfast friend. At the close of a day full of life's activities the evening touched him with the hem of her garment and drew her pall about him and he slept. His memory will linger in the minds of those who knew him as a happy thought of yesterday, until they too are hidden by the mists of death.

On behalf of the court, Mr. Chief Justice WINSLOW responded as follows:

The members of this bench bear willing and heartfelt testimony to the truth of all that has been so well said by the bar.

Death could have chosen no more shining mark than CHARLES QUARLES from the whole body of the Wisconsin bar. Not only was he a great lawyer, whose position as a leader was conceded by his brethren, but he was also a profound scholar, a great citizen, a man of affairs, and withal a delightful friend whose death must ever leave a vacant niche in the heart of every one who knew him. Endowed by nature with a masterful mind, a reasoning power as rare as it was brilliant and convincing, and a grasp of intellect which rightly claimed every field of learning as its own, his manners were yet as simple and unassuming as those of a child. Thus, although he was in truth an intellectual aristocrat, he was ever a true democrat, who shunned ostentation or parade, and who could be approached by the humblest citizen without embarrassment.

I knew him intimately from early manhood: we practiced in the same circuit, and when I went upon the trial bench he practiced before my court. Thus I feel that I can speak of him with full knowledge of his character and abilities.

Minds which are able to grasp the law and its application by intuition are rare, but such a mind was his. An intricate or complicated question seemed to present no serious difficulty to his keen intellect: he recognized the legal principle which should apply at once. While the ordinary mind might be obliged to spend long hours and perhaps days in arranging the facts and searching for the legal principles applicable to the situation, his mind seemed to grasp with unerring accuracy the fundamental question involved and apply to it the proper rule of law. He could state the law at once and leave the authorities to be marshaled in its support afterwards. To this remarkable clarity of perception he joined solid learning, exact logic, felicity of expression, and tireless industry.

Thus he entered upon every legal struggle thrice armed. No difficulty escaped his attention and no contingency found him unprepared.

With all these solid qualities he possessed also in a rare degree the saving graces of courtesy to court and counsel, and a scintillating but gentle wit; classic allusions came at will from a mind stored with the good literature of all ages, while sparkling simile and trenchant epigram drawn from the occurrences of daily life bubbled involuntarily from his lips and relieved the monotony of a long and tedious trial.

In appellate courts he was always welcome; his briefs were mod-

els of concise and logical reasoning couched in faultless diction, while his oral arguments were ever illuminating.

Honest in thought as well as in deed, his conception of the lawyer's duty to his client, to the court, and to society in general was of the very highest, and never, I am sure, did he knowingly depart from his ideal.

When relieved from professional cares and meeting his friends in familiar intercourse, his conversation had a charm which was all its own: now sparkling with humor, now embellished with exact learning, now permeated with frank but reverent philosophizing on the great problems of the universe, it formed a table-talk well worthy of permanent preservation.

I know from personal conversation with him that he was anticipating a partial release from his exacting toil at no distant date, and was looking forward with pleasure to some years of comparative freedom in which he could pursue his favorite literary and scientific diversions without let or hindrance from the calls of clients. His release came indeed, but it came all too quickly. Doubtless he had drawn too heavy drafts on a constitution never robust. In the midst of his successful labors, while he stood at the very summit of his career, with every intellectual power unimpaired and every man his friend, he went from us at eventide as one might take his candle in his hand and seek his chamber for the night.

I am not sure but that it was better so. I am not sure but he would have it so had he been given his choice. Far better this than slow decay and weary waiting for the end to come. Far better this than to live to feel his intellectual powers waning and realize that his usefulness was gone.

And so we say the final word "farewell" to that brave and knightly soul which has put forth into the unknown dark sooner, but only a little sooner, than its mates. Shall we again have converse with him? Shall we once more hold sweet communion with that rare spirit in some fairer land than this?

Alas, we know not,

"Yet love will dream and faith will trust,
(Since He who knows our needs is just)
That somehow, somewhere, meet we must."

CASES DETERMINED

AT THE

January Term, 1908.

STATE EX REL. McGOVERN VS. WILLIAMS, Circuit Judge.

April 23—May 8, 1908.

Courts: Decision of jurisdictional and preliminary questions: Refusal to entertain action: Superintending control of supreme court: Mandamus: *Vacation of orders: Selection of grand jurors: Identity of person chosen: Similarity of names: Designation of residence.*

1. A court must always inquire whether the law either gives it the jurisdiction or imposes upon it the duty to entertain a given controversy, and must inquire into existence of facts, either of notice to one of the parties or of some other preliminary condition, upon which the law imposes on it the power and duty; and in deciding these questions the court acts judicially.
2. Where an inferior court decides a jurisdictional question or one preliminary to the main controversy submitted to it adversely to its jurisdiction and refuses further action, such decision, although judicial in character, constitutes, if erroneous, a refusal to perform its duty with respect to the main controversy; and in the absence of other adequate and sufficient remedy this court may, under the superintending control granted in sec. 3, art. VIII, Const., review such decision and consider whether or not it is the duty of the inferior court to entertain the controversy.
3. Performance of its duty by the inferior court in such a case may be compelled by *mandamus;* and the writ may be so framed as to compel, as ancillary to and in aid of the primary relief granted, the vacation of orders made by the inferior court which constitute formal obstacles to the performance of such duty.

4. The decision of a trial court that the action of the grand jury in returning an indictment was void and that no valid indictment existed against defendant because a person not selected by the jury commissioners had served on such jury, is one preliminary to the main controversy and may be reviewed by this court under its constitutional superintending control of inferior courts.
5. Upon the list of names from which grand jurors were to be drawn the jury commissioners placed the name of "George J. Davies, 663 38th Street." A venire was served upon John George Davies, who lived at that address, and he attended and served as a grand juror. Upon the evidence (summarized in the opinion) it is *held*, contrary to the decision of the trial court, that the man who so served, and not a George Jeremy Davies who lived on Cedar street, was the identical person whom the commissioners had selected, and that an indictment found by the grand jury was not void because of his participation in its action.
6. The use of a middle initial may under some circumstances be very significant in the identification of a person; but that significance varies much with circumstances, and the misplacement of an initial used by one whose current Christian name is also used is so probable and frequent an occurrence, at least among those whose acquaintance with him is not exact and intimate, that its significance is very much diminished.
7. While jury commissioners have no official duty to state the place of residence of a person selected, the fact that they do state it is none the less significant of the identity of the person whom they had in mind in placing the name on the jury list, and is of so vastly greater weight than the mere transposition of an initial as to entirely outweigh it.

MANDAMUS to ORREN T. WILLIAMS, Judge of the Circuit Court for Milwaukee County. *Imperative writ granted.*

By the petition and alternative writ of *mandamus* it is made to appear that on April 1, 1904, an indictment was returned by a grand jury against one Biersach charging him with crime. To that indictment, when called up in the circuit court for Milwaukee county, three pleas in abatement were interposed. The second and third pleas have been overruled and are not material of statement. The first plea set

forth that the grand jury was illegally constituted in that one John George Davies served thereon, who was not selected by the jury commissioners and whose name was not placed upon the general jury list and was not drawn from the box as one of the seventeen men to constitute the grand jury in question, whereby he was incompetent to serve.

The court took testimony with reference to the identity of the person who had been selected by the jury commissioners and designated by the name George J. Davies, his name having also been drawn from the box as one of the grand jury, and reached the conclusion that the John George Davies who served upon the grand jury was not the person so selected and drawn by the jury commissioners. As a result of such conclusion he ordered that the indictment be abated and quashed and refused to proceed further with the trial of the charge therein made. He, however, did not formally discharge the prisoner, but entered a stay of proceedings to enable an application to this court for such relief as might be deemed proper.

The evidence on which the circuit court reached its determination is set forth in the petition, and all other facts material to the action of this court are conceded by the respondent to be so set forth, so that a final determination might be reached upon the motion to dismiss the writ and petition which was interposed by the respondent.

A large number of other indictments were presented by the same grand jury, the validity whereof is assailed on the same ground. The ruling of the circuit court will prevent the trial of such offenses, many of which are now barred by statutes of limitation, so that great and irreparable injury is done the public, and the administration of justice obstructed, if, as claimed by relator, the ruling of the circuit court is wrong.

For the relator there was a brief by the *Attorney General, Francis E. McGovern,* district attorney, and *Franz C. Esch-*

weiler, assistant district attorney, and oral argument by *Mr. McGovern* and *Mr. Eschweiler.* They argued, among other things, that precisely the relief prayed for here, to review on behalf of the state proceedings in a criminal case, has been granted in numerous other courts. *Luton v. Newaygo Circuit Judge,* 69 Mich. 610; *Grand Rapids v. Braudy,* 105 Mich. 670; *State ex rel. Bayha v. Philips,* 97 Mo. 331; *Swift v. Wayne Circuit Judges,* 64 Mich. 479; *People ex rel. Robison v. Swift,* 59 Mich. 529, 26 N. W. 694; *Louisell v. Benzie Circuit Judge,* 139 Mich. 40, 102 N. W. 371; *People v. Murray,* 72 Mich. 10, 15; *Clute v. Ionia Circuit Judge,* 139 Mich. 337, 102 N. W. 843; *Hill v. Morgan,* 9 Idaho, 718, 76 Pac. 323, 326; *State ex rel. Smith v. Smith,* 69 Ohio St. 196, 68 N. E. 1044; *State ex rel. Shannon v. Hunter,* 3 Wash. 92, 27 Pac. 1076; *State ex rel. Harris v. Laughlin,* 75 Mo. 358; *People ex rel. Coberly v. Scate,* 3 Scam. (4 Ill.) 351; *Crane v. Saginaw Circuit Judge,* 111 Mich. 496.

For the respondent there was a brief by *Lyman G. Wheeler,* attorney, and *Walter Schintz* and *Carl Runge,* of counsel, and oral argument by *Mr. Wheeler.*

DODGE, J. The present application is confessedly addressed to the power vested in this court by the constitution of superintending control over inferior courts. The meaning of that grant of power was very fully expounded in *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081, and the following conclusion reached and stated at page 614 (79 N. W. 1087):

"It is very apparent that when the makers of the constitution used the words 'superintending control over all inferior courts' they definitely referred to that well-known superintending jurisdiction of the court of king's bench. In England it was a branch of the king's power lodged with the king's court; in this country it is a branch of the sovereign power of the people, committed by them as a sacred charge to this court, not to be exercised upon light occasion, or when other and ordinary remedies are sufficient, but to be wisely

used for the benefit of any citizen when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen."

Since that case was decided the nature of this power has been the subject of very much explanation, but hardly with the result of greater clearness or exhaustiveness than in the words just quoted. Some of the more important of the later cases are the following: *State ex rel. Mitchell v. Johnson,* 105 Wis. 90, 80 N. W. 1104; *State ex rel. Fourth Nat. Bank v. Johnson,* 105 Wis. 164, 83 N. W. 320; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *State ex rel. W. G. Taylor Co. v. Elliott,* 108 Wis. 163, 84 N. W. 149; *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587; *In re Gates,* 117 Wis. 445, 94 N. W. 292; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State ex rel. Milwaukee E. R. & L. Co. v. Circuit Court,* 133 Wis. 442, 113 N. W. 722; *State ex rel. Milwaukee E. R. & L. Co. v. Circuit Court,* 134 Wis. 301, 114 N. W. 455.

It will be observed that one limitation upon the exercise of this power, stated in the first *Johnson Case* and many times reiterated, is the absence of any other adequate and sufficient remedy. 2 Spelling, Extr. Relief, § 1392; High, Extr. Leg. Rem. (3d ed.) § 177; *State ex rel. Meggett v. O'Neill,* 104 Wis. 227, 80 N. W. 447; *In re Gates, supra.* We, therefore, elsewhere in this opinion, without express reiteration, must be understood as intending that qualification in all cases where it may be stated the power exists. It is not material to the present case, for both parties concede and proceed on the assumption that if the acts of the circuit court here complained of are otherwise within reach of our superintending jurisdiction, exercisable by the writ of *mandamus,* other adequate remedy is wanting and that a case of exigent prejudice to public welfare is presented. *State v. Kemp,* 17 Wis. 669; *State v. Grottkau,* 73 Wis. 589, 41 N. W. 80, 1063; *Von Rueden v. State,* 96 Wis. 671, 676, 71 N. W. 1048; *U. S. v. Sanges.* 144 U. S. 310, 12 Sup. Ct. 609.

The present application is claimed to present a case where the circuit court refuses to act within its jurisdiction, for that, by reason of some preliminary consideration, it has declared that it has no right to proceed with the consideration of the charge against the accused. If that contention is sustained it will neither be necessary nor proper in the present case to attempt a disquisition upon or further definition of the jurisdiction of this court in other directions. That the act of the circuit court is a refusal to exercise its jurisdiction and perform its duty to consider the criminal charge against the accused seems too plain for discussion. He has declared that purpose most unambiguously, and, but for the stay entered to enable the application to this court, the accused would have been discharged: immune from further prosecution, it is said, because a new prosecution for his alleged offense is barred by the statute of limitations. Thus, *prima facie,* an obvious case is presented to which either a writ of *mandamus* or the old-time writ of *procedendo ad judicium* would be appropriate to command the circuit court to perform its duty to consider and judicially pass judgment upon the controversy instituted by this indictment. To this *prima facie* case it is responded that we cannot ascertain whether it is the circuit court's duty to proceed with the case without reviewing the obviously judicial determination made below that the indictment is void—clearly within the court's jurisdiction to resolve either way: a determination reached upon so clearly judicial acts as the weighing evidence and reaching conclusions upon disputed questions of fact, as also deciding uncertain questions of law as to the effect on the validity of the grand jury's action of the presence and participation of an unqualified person as a member of that grand jury. But this is no insuperable obstacle. This court is not universally restrained from reviewing acts done within the jurisdiction and judicial power of the inferior court in the exercise of superintending control. *State ex rel. Fourth*

Nat. Bank v. Johnson, 103 Wis. 623, 79 N. W. 1081; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 234, 82 N. W. 158; *State ex rel. Winchell v. Circuit Court,* 116 Wis. 253, 93 N. W. 16. True, it is frequently asserted that the writ of *mandamus* issued under the power of superintending control cannot be made to serve as a writ of error, and that when the lower court does take up any question for consideration and in its best judgment decides, it exercises jurisdiction and performs its duty, and there is nothing left but a supposed judicial error for review. High, Extr. Leg. Rem. (3d ed.) § 188; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 623, 79 N. W. 1081; *State ex rel. O., A. & B. W. R. Co. v. Burnell,* 104 Wis. 246, 251, 80 N. W. 460. What limitations upon that rule appear in practical application of superintending control need not here be discussed, with one exception, which seems specially relevant to the situation before us. The courts are agreed, with but little failure of unanimity, that though the resolution of either a jurisdictional question or of a preliminary one, which precedes the consideration of the main controversy proposed to the court, may be judicial in character, none the less the court refuses to perform its duty to that controversy when it resolves the preliminary question adversely and refuses further action, and the superintending court is not precluded from considering whether or not that duty exists. There could not well be argument against the power to direct the lower court to proceed to consider a suit when its refusal to do so was arbitrary or based on no stated reasons, but the result to the party is the same when the court states such reasons; he is equally denied the judicial consideration and determination upon his controversy which the trial court owes him as a duty. It is generally true of all official action, by courts or other officers, that they are obliged, before proceeding to the performance of that official duty, to decide whether the condition exists which calls it into activity. A court must always inquire

whether the law either gives it the jurisdiction or imposes upon it the duty to entertain a given controversy, and must inquire into existence of facts, either of notice to one of the parties or of some other preliminary condition, upon which the law imposes on him the power and the duty. In so deciding, he of course acts judicially. Where that judicial action can be corrected by ordinary appellate procedure there may be no need for the exertion of the more extraordinary superintending control; but where it cannot, the result of an erroneous adverse determination of the preliminary question is an effectual refusal to perform his duty and exercise his jurisdiction, as complete and as injurious as if done arbitrarily and without reason. The courts, English and American, agree with practical unanimity that such preliminary decision, however judicial in character, may be reviewed under the superintending power, and, in case of erroneous decision thereof by the inferior court, the latter should be required, by *mandamus,* to proceed to perform its duty toward the principal controversy notwithstanding its decision upon the preliminary question. Merrill, Mandamus, §§ 203, 204; 2 Spelling, Extr. Relief, §§ 1394, 1403; High, Extr. Leg. Rem. (3d ed.) §§ 147, 151, 188; Hayne, New Tr. & App. § 323; *Temple v. Superior Court,* 70 Cal. 211, 11 Pac. 699; *Territory ex rel. Travelers' Ins. Co. v. Judge,* 5 Dak. 275, 38 N. W. 439; *Rex v. Justices,* 14 East, 395; *Rex v. Justices,* 1 M. & S. 190; *Reg. v. Dayman,* 7 E. & B. 672; *Reg. v. Brown,* 7 E. & B. 757; *Ex parte Lewis,* L. R. 21 Q. B. Div. 191; *In re Grossmayer,* 177 U. S. 48, 20 Sup. Ct. 535; *In re Connaway,* 178 U. S. 421, 20 Sup. Ct. 951; *State ex rel. Harris v. Laughlin,* 75 Mo. 358, 366; *State ex rel. Shannon v. Hunter,* 3 Wash. 92, 27 Pac. 1076; *State ex rel. Smith v. Smith,* 69 Ohio St. 196, 68 N. E. 1044; *Hoke v. Comm.* 79 Ky. 567; *Cassidy v. Young,* 92 Ky. 227, 17 S. W. 485; *Hill v. Morgan,* 9 Idaho, 718, 76 Pac. 323; *State ex rel. Keane v. Murphy,* 19 Nev. 89, 6 Pac.

840; *State ex rel. Spence v. Dick,* 103 Wis. 407, 79 N. W. 421; *State ex rel. Rowell v. Dick,* 125 Wis. 51, 103 N. W. 229; *State ex rel. Schutz v. Williams,* 127 Wis. 236, 106 N. W. 286.

There is some contrariety of opinion as to just what questions are preliminary under this doctrine, and when the lower court will be considered to have entered upon consideration of the merits of the controversy. The English and Kentucky cases above cited present antithetic decisions upon that distinction. The ruling of the trial court in this case, that the action of the grand jury was void and that no indictment exists against Biersach to arouse either power or duty in the circuit court to try him, is, however, clearly a preliminary one within the most restricted definition of that term. Obviously that court has stopped short not only of any consideration of the guilt or innocence of the accused, but even of those earlier considerations whether the facts stated in the indictment would if proved constitute any crime. We conclude that a situation is presented to arouse the jurisdiction of this court under its power of superintending control to command the lower court to proceed to perform its duty to judicially consider and decide upon the criminal charge made by this indictment; to try the case of *State v. Biersach;* if, indeed, not precluded from so doing by invalidity of the indictment—a question we proceed to consider.

The evidence upon which the circuit court acted, while somewhat extended, may be summarized as follows: The jury commissioners met at the December, 1903, term of the municipal court of Milwaukee county and proceeded to select at least seventy-five persons whose names should be placed upon a list from which grand jurors should be drawn. They made such selections, the names being written under their direction by one Mr. Wieber, who acted as the clerk of the jury commissioners. Upon this list was set the name "George J. Davies." The law required no further designation; but

against each name was set a place of residence, and against the name George J. Davies was set "663 38th Street." In 1904, when a grand jury was ordered to be called, the jury commissioners convened, being still assisted by Mr. Wieber as their clerk, and slips bearing names taken from said list were put into a box, and, among others, a slip on which was first written in Wieber's handwriting "George J. Davies, 2825 Cedar Street," upon which, at the time of the trial of this plea in abatement, there appeared a pencil line drawn through that street and number, and pencil marks placed below it reading "663 38th Street." This slip was one of the seventeen drawn from the box, whereupon from said slips a list of the seventeen persons to constitute the grand jury for that term of court was written out under the direction of the commissioners and certified by them to contain the names of those who should constitute that grand jury, and upon this list appeared the name "George J. Davies, 663 38th Street," the law not requiring any other designation than merely the name. A venire was made out containing the same name and the same street number and was by the sheriff served upon John George Davies, who resided at the place specified, the return, however, stating that it was served personally upon the person named in the venire. John George Davies attended, answered as to his qualifications, and was sworn and served as a juror. Before being sworn he informed the clerk, apparently without the knowledge of the court or of the jury commissioners, that his correct name was J. George Davies instead of George J. Davies, and thereafter it so appeared upon the clerk's books. It appeared without dispute that the juror was commonly known amongst acquaintances as George Davies; that while he used the signature J. George he considered George his Christian name, and, not infrequently, he had been designated in correspondence and otherwise as George J. It further appeared without dispute that he had all other qualifications for service as a grand

juror except the one of having been selected for the jury list by the jury commissioners. On the other hand, there was produced a man whose name was George Jeremy Davies, who passed by the name of George Davies, and whose usual signature and designation in writing was George J. Davies, who lived at 2825 Cedar street, and who also possessed all the requisite qualifications of a grand juror except that of having been selected by the jury commissioners. He had some slight acquaintance with one or two of the jury commissioners, while John George had no acquaintance with them.

The foregoing states substantially all of the material facts from which the circuit court had to decide that the man who was called and did serve on the grand jury was not the person who had been selected for the jury list by the jury commissioners. The use of a middle initial, while it is said to have no significance in law, may of course under some circumstances be very significant of the identity of the person named; but that significance varies very much with circumstances, and the misplacement of an initial used by one whose current Christian name is also used is so probable and frequent an occurrence, at least among those whose acquaintance with him is not exact and intimate, that its significance is very much diminished. While the jury commissioners had no official duty to state the place of residence of the man whom they selected, the fact that they did state it is none the less significant of the identity of the man whom they had in mind in placing the name on the jury list, and we think is of so vastly greater weight than the mere transposition of the letter "J" in this name, as to entirely outweigh it; but when we add to this the apparent fact that the same jury commissioners, in the process of preparing the slip for insertion and withdrawal from the box and the record of it on the list of the grand jury actually drawn, discovered that the George J. Davies who appeared by the directory to live on Cedar street had apparently been designated thereon and industriously

caused such designation to be removed and to be substituted therefor the residence on Thirty-eighth street, we cannot avoid the conviction that it was established by overwhelming preponderance of evidence that the George Davies who lived at that place and who appeared in court in response to the venire in the presence of the jury commissioners and was accepted in answer to that name was the identical person whom those commissioners had selected as suitable for grand jury service. Hence, without discussing the effect of the presence and participation of the wrong man on the grand jury, we must conclude that the fact was not established, and that the circuit court erred in holding the indictment invalid.

It is further urged that the relief sought in this proceeding is the vacation of a certain order and that *mandamus* is not the proper remedy therefor. *State ex rel. Pfeiffer v. Taylor,* 19 Wis. 566; *State ex rel. W. G. Taylor Co. v. Elliott,* 108 Wis. 163, 84 N. W. 149; *State ex rel. Winchell v. Circuit Court,* 116 Wis. 253, 93 N. W. 16. This contention is based upon a misapprehension. The real and practical purpose, and obviously the primary one, is to require the circuit court to perform its duty to consider and decide upon the criminal charge presented, which it has refused to do. The fact, if it be such, that some orders theretofore made in that court constitute a formal obstacle to his so doing, merely invites an enlargement of the command which this court shall issue to the effect that the trial court take formal action necessary to remove those obstacles, as ancillary to and in aid of the primary relief sought and granted. That was the exact situation in both of the *Johnson Cases,* where the thing commanded was obstructed by certain orders entered by the court, and it was urged that they could not be reversed by *mandamus,* even to enable the performance of an act which the court's duty required. The court said (103 Wis. 624, 79 N. W. 1091):

"This court holds its power under no such uncertain terms. Those powers are not dependent upon the speed with which

the trial court enters orders. If it becomes necessary, in the due discharge of its power of superintending control, that orders of the inferior court be vacated, this court will not hesitate to compel the vacation of such order by the inferior court by so framing its writ of *mandamus.*"

The same distinction was also noted in the opinion in *State ex rel. W. G. Taylor Co. v. Elliott,* 108 Wis. 164, 84 N. W. 149. When, therefore, it is concluded that the circuit court should be directed to proceed with his duty as above stated, it is entirely within the power of this court to command that he remove any obstacles to such proceeding which his own improper acts have erected. The command of the alternative writ goes no further than this.

We understood respondent to concede that nothing material could be added to the petition and alternative writ by return, so that therefore the merits might be decided on the present hearing.

By the Court.—Let imperative writ issue.

R. CONNOR COMPANY, Appellant, vs. ÆTNA INDEMNITY COMPANY, imp., Respondent.

March 11—June 5, 1908.

School districts: Powers: Building contracts: Payment for materials: Liens: Bond of contractor: Agreement for benefit of third persons.

1. A school district, as incident to the power to erect a school building and provide for payment therefor, has authority to contract for the protection of third persons who furnish to the principal contractor materials used in the construction of the building.
2. No right to a lien upon property of a school district is given to laborers or materialmen.
3. A contract with a school district for the erection of a school building provided, among other things, that the contractors should provide and furnish all materials at their expense, and that materials delivered on the premises should be considered

the property of the district and might be used by it in case it assumed control of the work for the contractors. A bond given by the contractors to the district was conditioned that they duly perform the contract "and pay for all labor and material that enter into the construction of the building." *Held*, that the bond was security for payment for material used in the building, upon the default of the contractor. *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, distinguished.

4. The fact that, through a mistaken belief of the parties that the property was liable to liens for materials, the contract provided that payments to the contractors should be made upon proof that the property was free from such liens, did not render ineffectual the provision that the contractors should pay for all materials or show that the bond was not given to secure such payment.

5. The bond being a contract for the benefit of the materialmen, it was not necessary that they should be ascertained or known at its inception to entitle them to its benefits. They might adopt it and enforce it at law as if originally made by their express authority.

APPEAL from an order of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Plaintiff seeks to recover for materials furnished to and used by the firm of J. J. Olsen & Son in the construction of a high school building under a contract between them and the school district. The contract provided that the contractors should construct the building and provide all labor and materials needed for the due performance of the work, and that all material delivered on the premises to form part of the work should be considered the property of the district and was not to be removed without its consent. In the event of the contractors being unable to complete the work because of bankruptcy or unreasonable delay the district might take possession of the premises and carry the work to completion, the expense thereof to be deducted from the amount provided as payment for the work; and in that event the contract provided that the district should have the right to use the scaffolding or fixed tackle belonging to the contractors so long as it should be wanted for the work. It was further provided

that the school district should not in any manner be answerable for any of the materials or other things used and employed in finishing and completing the building, but that, whenever required, the contractors should produce all vouchers showing the quality of the goods and the materials used; that payments should be made in the manner provided in the specifications; and that for the protection of the district against the lien laws the contractors, if required, should show by affidavit or otherwise that there were no liens recorded against the property at the time of making any or the final payment, and that the property was free from all liens or claims against the premises or the contractors for work done or material furnished on the work. The contractors and the *Ætna Indemnity Company* gave a bond to the school district, binding themselves to pay to the school district the sum of $12,000 upon the condition that if J. J. Olsen & Son should duly perform the contract and fulfil all the several stipulations therein provided, "and pay for all labor and material that enter into the construction of said building," then the obligation was to be void, but, if otherwise, then the obligation was to remain in full force and effect.

This action is brought against the contractors and the surety company to secure payment of the amount due for material furnished the contractors and used in the execution of the contract. The surety company demurred to the complaint on the ground that there was a defect of parties plaintiff, in that the school district had not been made a party plaintiff, and that the complaint did not state a cause of action. The demurrer was sustained upon the ground that the bond had been executed for the benefit of the school district only. This is an appeal from the order of the court sustaining the demurrer.

For the appellant there were briefs by *Andrews & Rush,* attorneys, and *Goggins & Brazeau,* of counsel, and oral argument by *Theodore W. Brazeau.*

For the respondent there was a brief by *Cary, Upham & Black,* and oral argument by *W. E. Black.* They contended, *inter alia,* that the contract and bond do not evince an intent to secure any benefit to the plaintiff. The obligation of a surety is *strictissimi juris,* and nothing is to be taken against him by inference or intendment. *W. W. Kimball Co. v. Baker,* 62 Wis. 526; *Smith v. Lockwood,* 34 Wis. 72, 78; *Nichols v. Palmer,* 48 Wis. 110. This rule applies to a surety for hire. *Lonergan v. San Antonio L. & T. Co.* (Tex.) 104 S. W. 1061; *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, 440. The contract of the Olsens for the construction of the schoolhouse nowhere contains any promise or stipulation on their part to pay materialmen for materials used therein. *Greenfield L. & I. Co. v. Parker,* 159 Ind. 571, 65 N. E. 747; *Green Bay L. Co. v. Ind. School Dist.* 121 Iowa, 663, 97 N. W. 72; *Campbell & C. Co. v. Estate of Carnagie,* 98 Wis. 99, 101. The contract and bond are to be read together, and the latter interpreted in the light of the former. *Guaranty Co. v. Pressed B. Co.* 191 U. S. 416, 423. It is apparent that the contract was drawn to protect the district from any liens or claims for liens for "work or materials," and the corresponding expression in the bond must be construed to refer only to labor and materials which might become a lien. Plaintiff was not entitled to a lien, and therefore was not within the contemplation of the provisions of the contract and bond against liens. *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434; *Green Bay L. Co. v. Ind. School Dist.* 121 Iowa, 663, 97 N. W. 72; *Hunt v. King,* 97 Iowa, 88, 66 N. W. 71; *Montgomery v. Spencer* (Utah) 50 Pac. 623; *Smith v. Bowman* (Utah) 9 L. R. A. N. S. 889, and note; *Townsend v. Cleveland F. P. Co.* 18 Ind. App. 568, 47 N. E. 707; *Spalding L. Co. v. Brown,* 171 Ill. 487, 49 N. E. 725; *Simonson v. Grant,* 36 Minn. 439, 31 N. W. 861; *Campbell & C. Co. v. Estate of Carnagie,* 98 Wis. 99, 101. The contract and bond do not contain any promise legally

enforceable by the plaintiff. A condition of the bond, although it may be of incidental benefit to a third party, cannot be construed into a promise of payment to such third party. *Parker v. Jeffery,* 26 Oreg. 186, 37 Pac. 712; *Turk v. Ridge,* 41 N. Y. 201; *Simson v. Brown,* 68 N. Y. 355.

The following opinion was filed March 31, 1908:

SIEBECKER, J. The trial court sustained the demurrer to the complaint upon the ground that the undertaking on the bond was for the protection of the school district only, and that it contained no promise or obligation to pay any sum to any person, corporation, or class of persons "upon any account whatever," and hence that plaintiff had no claim against the indemnity company for the price of the material it furnished to the Olsens and which was used in the construction of the schoolhouse. The authority of the school district to contract for the protection of third persons furnishing material to the principal contractors to be used in the erection of the building is amply sustained by the adjudications. This authority is one incident to the power given it to erect such a building and to provide for payment therefor. Such power embraces the right to provide for the payment for the material that has actually been used in the erection and completion of the building. The objects of an agreement to secure payment for such material are the same as the objects secured by the lien laws to private parties. Such agreements are sustained because they afford a just protection to the persons furnishing materials for public buildings, and because they operate to the interest of municipalities in securing responsible dealers and better material than under the greater uncertainties incident to transactions dependent on the personal responsibility of contractors. Such contracts are just and equitable between the parties and secure protection of the public interests and of the persons whose property and labor have been applied to public uses. *Knapp v.*

Swaney, 56 Mich. 345, 23 N. W. 162; *St. Louis v. Von Phul,* 133 Mo. 561, 34 S. W. 843; *Baker & Co. v. Bryan,* 64 Iowa, 561, 21 N. W. 83; *City and County of Denver v. Hindry,* 40 Colo. 42, 90 Pac. 1028.

Whether or not the parties to this transaction intended that the materialmen should be paid for the material furnished and used in the building by the principal contractors, and, in case of default in such payment by them, whether the bond was given to secure such payment, must be gathered from the stipulations of the contract and bond. The principal contract does not provide that the contractors were to furnish a bond of indemnity to the school district. Such a bond was, however, agreed upon, and one was given by the contractors and the indemnity company which was accepted by the district officers. Under it the contractors and the indemnity company bound themselves in the sum of $12,000 to the school district, conditioned that, should the contractors "duly perform said contract and fulfil all the several stipulations therein provided, and pay for all labor and material that enter into the construction of said building," then the obligation should be void, otherwise it was to remain in full force.

It is specifically agreed that the principal contractors are obligated under the contract to provide and furnish all material for the building at their expense. It is also agreed that all material delivered on the premises to be used in the building is to be considered the material of the district and not to be removed without its consent; that the district is not to be held accountable for any material used in the construction of the building; and in case the contractors fail to comply with and carry out the agreement the district is authorized to take possession of the premises, control the construction, and provide such additional material and labor as may be necessary to complete the contract, the cost thereof to be deducted from the contract price. It is also provided that payments made while the work progressed and the final

payment should be made upon the architect's certificates and upon proof by the contractors, for the protection of the district against the lien law, "that the property is free from all liens or claims against the premises or the said contractors for work or materials furnished on said work." That the law awards no right to a lien upon the property of the district to the laborers and materialmen is not controverted. *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, 438, 85 N. W. 648, and cases cited.

The respondent urges that this stipulation in itself evinces an intent that the parties contracted only to protect the district from claims for liens upon the property, and that this stipulation operates to exclude the idea that it was intended and agreed as a condition that the contractors should pay for the material, and in default thereof that the surety secured payment for it. It cannot be questioned that the parties believed the property liable to a lien in case the contractors failed to pay for the materials. Acting on such belief the parties stipulated that the contractors should pay for the material and show proof of payment to entitle them to payments on the contract. The fact that the parties to the contract, through their mistake of the law on the subject, were induced to enter into the stipulation providing for payment for the material, does not render ineffectual the intent of the stipulation providing that the contractors should pay for the material. That the parties intended that the contractors should so pay for the material used and provide for it is corroborated by the stipulations of the contract that the material delivered on the premises should be considered the property of the district, and that it should have the right to use it in case it assumed control of the construction work for the contractors. Upon these particular provisions and the general tenor of the contract, and in view of the equitable consideration favoring payment out of the funds furnished by the district which received the benefit of the material, it is manifest

that the provisions of the contract for the construction of the building and the express provision of the bond of the indemnity company insuring performance of all the several stipulations therein, and especially to "pay for all labor and material that enter into the construction of said building," were intended by the parties to secure payment for the material furnished and used in the building. This harmonizes with and enforces all of the stipulations of the contract and bond, and sustains the stipulation in the bond that it is conditioned to secure performance by the Olsens of all the stipulations of the contract, "and pay for all labor and material that enter into the construction of said building."

Reliance is placed by respondent on the case of *Electric A. Co. v. U. S. F. & G. Co., supra,* as one wherein a similar contract and bond were held not to constitute an agreement to pay for material. That case is clearly distinguishable from the instant one. It was there held that, since the contractors agreed to give a bond conditioned on the payment by them of claims for material, acceptance of a bond without such a condition showed a waiver of such a stipulation in the contract, and hence the surety company was not liable for unpaid claims for materials. Here the situation is wholly different, in that this bond contains an express agreement which harmonizes with the intent evinced by the contract requiring payment for the material by the contractors, and hence the bond is security for payment for the material upon the default of the contractors.

Since the bond secured payment by the contractors for the material used in the construction of the building, it was therefore a contract between the district and the parties thereto for the benefit of those persons furnishing material to be used in the construction of the building. Under such circumstances the third party need not be ascertained or known at its inception to entitle him to the benefits thereof. The third party may adopt it when he becomes informed, and

may enforce it at law as if originally made by his express authority. *Johnston v. Charles Abresch Co.* 123 Wis. 130, 101 N. W. 395; *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440; *Lenz v. C. & N. W. R. Co.* 111 Wis. 198, 86 N. W. 607; *Peterson v. C. & N. W. R. Co.* 119 Wis. 197, 96 N. W. 532. This necessitates reversal of the order sustaining the demurrer.

By the Court.—The order sustaining the demurrer is reversed, and the cause remanded with directions to enter an order overruling the demurrer, and for further proceedings according to law.

The respondent moved for a rehearing, and in support of the motion there was a brief by *Cary, Upham & Black,* its attorneys, and *John J. Cook,* of counsel.

For the appellant, in opposition to the motion, there was a brief by *Goggins & Brazeau,* of counsel, and *Andrews & Rush,* attorneys.

The motion was denied June 5, 1908.

STATE EX REL. ENGLE, Respondent, vs. HILGENDORF, Appellant.

May 8—June 5, 1908.

General appearance: Application for change of venue: Pleading: Liberal construction: Unlawful detainer: Tenancy from month to month: Beginning and ending of term: Notice to quit: Service.

1. A defendant who applies for a change of venue thereby enters a general appearance in the action, even though in form he appears specially for that purpose.
2. If the essential facts can be gathered from a pleading or may reasonably be inferred from its allegations, it is good, though such allegations be in form uncertain and incomplete.
3. In an action for unlawful detainer, a complaint alleging that on or about October 1, 1905, defendant entered into possession of

the premises as a tenant from month to month, and was to pay therefor a stipulated sum in advance on the first day of each and every month, and that on October 30, 1906, notice was served upon him to quit and deliver up possession of the premises on December 1, 1906, sufficiently shows that the tenancy began on the first day of the month and expired on the last day of the month.

4. An allegation in such case that during the month of October, 1906, the plaintiff purchased the premises and that he *served* the notice to quit on October 30, 1906, sufficiently shows that he purchased prior to October 30 and *as landlord gave* the notice, as required by sec. 2183, Stats. (1898).

5. An allegation that notice to quit was served upon defendant by delivering to and leaving with his wife, naming her, a written notice, notifying him to deliver up the possession and to remove from the premises, etc., and that defendant could not be found, sufficiently shows that the wife was a person of proper age and resided upon the premises, so as to make the service sufficient under sec. 2184, Stats. (1898).

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an action of unlawful detainer, brought by the appellant against the respondent in justice's court for Milwaukee county. On the return day the defendant appeared specially by his attorney and filed an affidavit of prejudice and paid the statutory fees; whereupon the case was removed to another justice. Before the second justice the defendant again appeared specially by his attorney and objected to the jurisdiction of the court over the person of the defendant and over the subject matter. These objections were overruled, the defendant taking no further part, and judgment was rendered in favor of the plaintiff. The cause was removed to the circuit court by *certiorari,* where the judgment of the justice's court was reversed for want of jurisdiction. From the judgment of reversal this appeal is taken.

For the appellant there was a brief by *Sheridan & Wollaeger,* attorneys, and *Arthur A. Mueller,* of counsel, and oral argument by *Mr. Mueller.*

Louis A. Lecher, for the respondent.

BASHFORD, J. The contention is made on behalf of the respondent that the justice's court never acquired jurisdiction of his person, for the reason that the return of the constable shows that there was no proper service of the summons. Appellant's counsel insists that if there was any ground for this objection it was waived by the defendant when he appeared before the court on the return day and filed an affidavit of prejudice; that such appearance, though special in form, became general in fact when affirmative relief was asked by defendant, and cured any defect in the service of summons upon him or in the return thereto. The general rule is stated in 2 Ency. Pl. & Pr. 612, as follows: "A defendant by making the proper application for a change of venue, such as filing an affidavit, enters a general appearance in the action." In order to preserve his status as not having been properly served with the summons, the defendant must abstain from making any appearance in the action other than to raise the question of jurisdiction of his person. *Corbett v. Physicians' C. Asso.* 135 Wis. 505, 115 N. W. 365; *Bestor v. Inter-County Fair,* 135 Wis. 339, 115 N. W. 809. The subject has been so fully considered by this court in the cases cited, where the early decisions are referred to, that no further discussion is deemed necessary. The respondent must be held to have waived any defects in the service of the summons or in the return by making the application for a change of venue.

It is further urged by the respondent that the justice's court did not acquire jurisdiction of the subject matter by reason of the insufficient averments of the complaint. This question was not passed upon by the circuit court. The defendant's tenancy was from month to month, and the notice to quit should be given to expire at the conclusion of the month's tenancy. It is urged that inasmuch as the complaint alleged that the respondent was let into possession on or about the 1st of October, 1905, and the notice to quit was

served October 30, 1906, and expired December 1, 1906, it is impossible to tell from the complaint when the monthly tenancy began or expired. Sec. 3362, Stats. (1898), provides, in substance, that the party complaining shall file a complaint in writing, giving therein a description of the premises of which possession is claimed, stating the facts which authorize the removal of the person in possession, naming him, and praying for his removal. Sec. 2668, Stats. (1898), states that in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties. The scope of that section has been frequently considered and applied by this court. In *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672, it is said:

"Under the proper rule every reasonable intendment is to be considered in favor of the pleading, and everything essential to the cause of action sought to be stated, reasonably inferable from the language used, is to be deemed as effectually pleaded as if expressly alleged."

And further:

"If the essential facts can be gathered from the pleading or may reasonably be inferred from the allegations, it is good, though such allegations be in form uncertain and incomplete."

The complaint here alleges that the respondent entered into possession of the premises as a tenant from month to month, paying therefor a stipulated sum in advance on the first day of each and every month. The only reasonable conclusion to be derived from this statement is that the tenancy began on the first day of the month and expired on the last day of the month. The objection to this averment is not therefore available.

The contention is made on behalf of the respondent that the notice to quit must be given by the landlord. The complaint alleges that the appellant purchased the property dur-

ing the month of October, 1906, and served the notice to quit on October 30th. The reasonable inference is that the purchase was made prior to October 30th; otherwise there would have been no reason for giving the notice by appellant. The complaint states that he served the notice, which clearly implies that he gave the notice in accordance with the language of the statute. Sec. 2183, Stats. (1898), does not require that the landlord shall personally give or serve the notice. It may be given on his behalf. The authorities upon this point are referred to in the notes to that section.

Respondent's counsel insists that under sec. 2184 the notice must be served by delivering the same to the tenant or some person of proper age residing upon the premises, and that the complaint contained no sufficient averment in that respect. The complaint alleges that the appellant served upon the respondent, by delivering to and leaving with his wife, naming her, a written notice, notifying him to deliver up the possession of said premises on the 1st day of December, 1906, and containing a demand that he remove therefrom on or before that date. The date when the notice was served was stated, and, further, that the appellant was unable to find the respondent. The reasonable inference from this averment is that the appellant's wife was of proper age and that she resided upon the premises. Consequently the averment was sufficient.

We conclude, therefore, that the justice's court acquired jurisdiction of the person of the respondent and also of the subject matter of the action. The foregoing considerations lead to the reversal of the judgment.

By the Court.—Judgment reversed.

FERGUSON, Trustee, Appellant, vs. JANSEN, Respondent.

May 8—June 5, 1908.

Bankruptcy: Preferences: Knowledge of insolvency: Evidence.

A finding of the trial court that at the time when certain payments were made by a corporation to defendant, within four months prior to the bankruptcy of the corporation, the defendant did not know or have good reason to believe that the corporation was insolvent, is *held* to be sustained by the evidence. TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *McElroy & Wetzler,* and oral argument by *W. J. McElroy.* As to the defendant's knowledge or reasonable cause to believe that the C. W. Milbrath Company was insolvent, they cited *In re Eggert,* 102 Fed. 735; *In re Virginia H. M. Co.* 139 Fed. 209; *In re Jacobs,* 1 Am. Bankr. Rep. 518; *Jackman v. Eau Claire Nat. Bank,* 125 Wis. 465, 104 N. W. 98; *Suffel v. McCartney Nat. Bank,* 127 Wis. 208, 106 N. W. 837.

For the respondent there was a brief by *Lorenz & Lorenz,* attorneys, and *Clarke M. Rosecrantz,* of counsel, and oral argument by *Mr. Rosecrantz.* They cited Bankr. Act July 1, 1898, ch. 541, §§ 60*a,* 60*b,* 30 U. S. Stats. at Large, 562 (U. S. Comp. Stats. 1901, p. 3445); sec. 67, Id.; *In re Clifford,* 136 Fed. 475; *N. Y. Co. Nat. Bank v. Massey,* 192 U. S. 138, 24 Sup. Ct. 199; sec. 57*e,* Bankr. Act; *In re Steam Vehicle Co.* 121 Fed. 939.

TIMLIN, J. This action was brought by the appellant as trustee in bankruptcy of the C. W. Milbrath Company, a corporation, to recover $1,200, the aggregate of payments made and value of property transferred by said company to the respondent within four months prior to the bankruptcy of the

Milbrath Company, which occurred August 18, 1905. The findings of the trial court were substantially to the effect that on March 9, 1905, more than four months prior to the bankruptcy, the said Milbrath Company, in exchange for a note and mortgage held by the respondent, transferred to him 212 shares of corporate stock belonging to the Milbrath Company, at the same time agreeing to pay the respondent an additional $200 for his note and mortgage. The note and mortgage were to be assigned to the Milbrath Company when this last $200 was paid. Prior to July 20, 1905, the Milbrath Company transferred to the respondent a land contract upon which there was due $150 in part payment, the defendant, *Jansen,* transferred the note and mortgage to the Milbrath Company, and on August 1, 1905, the Milbrath Company paid the respondent the remaining $50. There was a further finding that at the time of the sale and transfer of the shares of stock to the respondent the latter did not know and had no reasonable cause to believe that the Milbrath Company was insolvent, and that at the time the respondent transferred and delivered the note and mortgage in question to the Milbrath Company the respondent did not know and did not have reasonable cause to believe that the Milbrath Company was insolvent.

There are only two seriously controverted points of fact: First. Was the transfer of the 212 shares of stock made within four months of the bankruptcy? Second. Did *Jansen* know, or have reasonable cause to believe, that the Milbrath Company was insolvent at the time of either payment to him? This court is convinced the finding that the transfer of shares of stock to *Jansen* was made more than four months prior to the bankruptcy and that *Jansen* did not at that time know or have reasonable cause to believe the Milbrath Company insolvent is not contrary to the clear preponderance of the evidence, hence cannot be overthrown. *Loeb v. O'Brien,* 93 Wis. 249, 67 N. W. 415. With reference to

the other two payments there is no doubt they were made within four months of the bankruptcy, and the writer is of opinion that the evidence is practically undisputed that *Jansen* had at the times of such payments reasonable cause to believe the Milbrath Company insolvent. But the remaining members of this court are of opinion that the finding that *Jansen* did not then know, and did not then have reasonable cause to believe, that the Milbrath Company was insolvent, is not against the clear preponderance of the evidence, and that the payments were made to *Jansen* in the usual course of business and without intention to create a preference. In reaching this conclusion they give greater weight and significance to the testimony of *Jansen* than I do.

Recording the opinion of all the other members of this court, it is that the judgment appealed from should be affirmed.

By the Court.—Judgment affirmed.

INGLIS, Respondent, vs. FOHEY, Executrix, and others, Appellants.

May 9—June 5, 1908.

Contracts: Vendor and purchaser of land: Specific performance: Indefiniteness: Description of land: Practical construction by parties: Time of performance: Tender and demand: Dower rights: Temporary injunction preserving status quo.

1. Although a written agreement to convey land is in some respects indefinite or ambiguous, if, by aid of evidence showing the situation and surroundings of the parties at the time and their subsequent acts, if any, construing the terms of the writing, the court can with reasonable certainty determine the meaning intended by the parties, the contract will not be allowed to fail, but will be construed in the light of such evidence and will be enforced as so construed if there is no other fatal objection to it.

2. Indefiniteness in a written agreement in respect to the land intended to be covered by it is *held* in this case not to prevent the enforcement of specific performance, there having been a practical location of the premises by the acts of the parties, including the employment of a surveyor who, at the request of both parties, made a survey, set stakes, and made a plat, and delivery of the plat, with an order for abstracts, to the agent of the former owner from whom it was expected each party would receive title directly to his share of the land under their agreement.
3. The fact that the time of performance is not fixed in a written agreement does not prevent the enforcement of specific performance, the legal implication being that it was to be performed within a reasonable time.
4. Any defect in the tender of the purchase price or in the demand for a deed is immaterial where the vendor has utterly repudiated the contract to convey.
5. Where a husband who had a mere contract for the purchase of land, upon which he had paid nothing, agreed to divide the land with a third person, the right of such third person to demand a deed of his part when the husband received title to the whole was prior and superior to any right of dower.
6. Defendant, having a contract for the purchase of land, agreed to divide the land with plaintiff, and received $25 to secure the agreement, to be returned to the plaintiff when contract should be entered into with the original vendor; but defendant afterwards received title to the whole premises. *Held*, that the condition for the return of the $25 had ceased to exist, and upon compelling conveyance by defendant of plaintiff's share of the land the $25 was properly treated as having been paid to defendant thereon.
7. In the action to compel such conveyance, plaintiff being in possession, as tenant of the original vendor, of that part of the land which he asked to have conveyed, it was proper by injunctional order to restrain the defendant from interfering with such possession, plaintiff being also required to pay a monthly rental into court to abide the event of the action.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action by the vendee to enforce specific performance of an alleged written contract to convey certain premises in the city of Milwaukee. The action was origi-

nally brought against Henry Fohey and *Rosa Fohey,* his wife, but Henry Fohey having died after judgment, and his wife having been appointed executrix of his will, the action was revived in this court in her name as executrix.

The defendant Henry Fohey answered, admitting the execution of two written instruments, but denying that they amounted to an enforceable contract, and alleging that if any contract was made it was merely verbal and hence void. Upon the trial the facts were not greatly in dispute and may be stated in substance as follows:

On and for some time prior to April 28, 1906, the Wisconsin National Bank of Milwaukee owned two adjoining lots, numbered 8 and 9, in the subdivision of that part of block 9 in Clark's addition to Milwaukee lying north of National avenue. There was a brick house on lot 8, which was numbered 1018, and a frame house on lot 9, which was numbered 1020, National avenue, beside a small frame cottage on the back end of the property fronting on Twenty-first avenue. The plaintiff for several years had occupied the brick house on lot 8, numbered 1018, as a tenant of the bank. The Wisconsin Trust Company was acting as agent of the bank for the sale of the entire premises, and on the 28th day of April, 1906, the defendant Henry Fohey entered into a written contract with the bank, by which the bank agreed to convey the premises to him upon the payment of $8,000. On the evening of the same day, which was Saturday, Fohey and the plaintiff met and discussed the question of a joint purchase of the premises, and as a result of that discussion executed the following agreement:

"Mil., April 28, 1906.

"We, the undersigned, hereby agree to divide the property numbered 1018 National avenue, brick house, and 1020 National avenue. *Mr. Inglis* to have the property west of the line of Mr. Albright's property enough feet to take brick house and eaves with one foot added or 32 inches from wall

of bay window. Mr. Fohey to have all land west of said 32 inches and pay $3,775.00 (three thousand seven hundred and seventy-five dollars). *Mr. Inglis* to pay $4,225.00 (forty-two hundred twenty-five dollars) for the property described.

"HENRY FOHEY.
"CLEM INGLIS."

At the same time *Inglis* paid Fohey $25 and received from him the following receipt:

"Milwaukee, Wis. Apr. 28, 1906.

"Received of *C. W. Inglis* twenty-five and 00/100 dollars as a deposit to secure and abide by a contract signed by said *C. W. Inglis* and Henry Fohey. The said twenty-five dollars to be returned to said *C. W. Inglis* when contract is entered into with the Wisconsin Trust Company in relation to the property 1018 and 1020 National avenue.

"HENRY FOHEY."

Upon the following day a surveyor, at the request of both parties, made a survey of the premises and set stakes marking the line of division named in the agreement. The surveyor also made a small sketch of the premises, with the division line marked on it, and gave it to the plaintiff, and on Monday following both parties met at the office of the Wisconsin Trust Company, gave the surveyor's sketch to the company, and ordered abstracts made of the property, the original being for Mr. Fohey and a certified copy for *Mr. Inglis,* which abstracts were, respectively, delivered a few days later. On the 7th day of May, 1906, the defendant Fohey applied to the owner for a warranty deed of the entire premises, and the same was at once executed and delivered, and Fohey at the same time mortgaged the premises to one *Godsell* for $4,800, both deed and mortgage being recorded on the day of their execution. On the 11th day of May the plaintiff tendered to Fohey $4,200 and demanded a conveyance of that part of the premises which he claimed was to be conveyed to him by the agreement, but Fohey refused to do anything in the matter.

Upon these facts the trial court entered judgment for specific performance of the contract and for conveyance by defendants to the plaintiff of that part of the premises claimed by plaintiff upon payment by the plaintiff of $4,200 into court, and directed that the same be applied upon the *Godsell* mortgage and any other liens on the premises, except taxes, accruing since April 28, 1906.

It appears that after the commencement of the action the plaintiff, on an affidavit showing that the defendant threatened to interfere with his possession of the premises in dispute, obtained a temporary injunctional order restraining any such interference pending the litigation. The defendants filed exceptions to the material findings of fact and appeal from the judgment.

Frank H. Gugel, for the appellants.

For the respondent there was a brief by *O. W. Bow,* attorney, and *Chas. Quarles,* of counsel, and oral argument by *Mr. Bow.*

WINSLOW, C. J. The defendants' contentions are, in substance, that the agreement between Fohey and the plaintiff, made on April 28, 1906, is so indefinite, uncertain, and vague that it is not enforceable as a land contract, and that the evidence admitted by the court, showing the circumstances under which it was made and the subsequent acts of the parties construing its terms by their acts, was not admissible. The written contract is certainly indefinite in several particulars, especially in respect to the description of the real estate intended to be covered by it. If the court had no further information than that given by the writing on its face, it seems probable that it would be impossible of enforcement because of its indefinite terms. But where parties have attempted to reduce an agreement to writing, and such writing is in some respects indefinite or ambiguous, the contract does not necessarily fail, nor will a party suing upon it

be denied relief. If, by aid of evidence showing the situation and surroundings of the parties at the time, and their subsequent acts, if any, construing the terms of the writing, the court can with reasonable certainty determine the meaning intended by the parties, the court will not allow the contract to fall, but will construe it in the light of such evidence and enforce its terms as so construed, if there be no other fatal objections to it. This principle is so well established that discussion of it, or citation of authorities in its support, seems hardly necessary, but reference is made to *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459 (where the authorities on this general subject are collated), and to the case of *Docter v. Hellberg,* 65 Wis. 415, 27 N. W. 176. The court rightly received such evidence in the present case, and there can be no doubt that the court arrived at a correct conclusion as to the proper construction of the contract.

The fact that the time of performance was not fixed does not prevent specific performance. The legal implication is that performance is to take place within a reasonable time. *Williamson v. Neeves,* 94 Wis. 656, 69 N. W. 806. If there was any defect in the tender or demand for a deed, that fact was immaterial, because the defendant utterly repudiated the contract. *Kreutzer v. Lynch,* 122 Wis. 474, 100 N. W. 887. The defendant *Rosa* had no inchoate dower right, because her husband had no title, legal or equitable, at the time he made the contract with the plaintiff, but only a mere contract right to purchase; hence when he afterwards received his title it came to him subject to the plaintiff's right to demand a deed of that part which is in controversy. As to this part, therefore, the plaintiff's right is prior and superior to any right of dower.

It is objected that the court only required the plaintiff to pay $4,200 into court when the contract fixes the sum to be paid at $4,225. It appears, however, that plaintiff paid Fohey $25 at the time of the contract. True, this was to be

returned when a contract for the property was entered into with the trust company. This condition, however, was plainly in view of the then existing contemplation of the parties that a contract was to be made with the trust company by which each party was to receive title to his share direct from the former owner. As this contract was never made and cannot now be made, the condition for return has ceased to exist, and the judgment must necessarily be construed as determining that the defendant has a right to and should retain the sum.

The temporary injunctional order restraining the defendant from interfering with plaintiff's possession was very plainly a proper order. It simply preserved the *status quo* pending the litigation. By a subsequent order the plaintiff was required to pay a monthly rental into court to abide the event of the action, and thus the rights of all parties were protected.

By the Court.—Judgment affirmed.

GATZWEILER, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

May 9—June 5, 1908.

Accident insurance: Investment contract: Injury caused by negligence: Subrogation of insurer: Parties.

In the absence of any provision expressly making a policy of accident insurance an indemnity contract it is to be regarded as an investment contract in which the only parties concerned are the insurer and the insured or the beneficiary. Upon payment under such contract on account of an injury sustained by the insured the insurer does not become subrogated *pro tanto* to the right of the insured to recover from one who wrongfully caused the injury, and is not a necessary party to the action for such recovery.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to recover for a personal injury claimed to have been produced by defendant's negligence. The complaint stated facts sufficient to constitute a cause of action. Defendant answered in abatement that plaintiff when he was injured was possessed of a policy of accident insurance or contract to indemnify him against such injuries as the one in question, and that pursuant thereto before the action was commenced he received from the insurance company $2,500 on account of his injury, and that by reason thereof said company became subrogated to plaintiff's right of action against the defendant to the extent of said $2,500, and so interested on that account in the subject of the action that it cannot properly proceed without its presence as a party to the litigation.

Plaintiff demurred to the answer for insufficiency and the demurrer was sustained. Defendant appealed.

The cause was submitted for the appellant on the brief of *Clarke M. Rosecrantz,* and for the respondent on that of *Sheridan & Wollaeger* and *Webb & Webb.*

MARSHALL, J. The appeal presents the question of whether the rule that when an insurance company has been compelled to pay or has paid a loss covered by its policy, it is thereby subrogated to the rights of the insured to the extent of such payment against a third person who wrongfully caused the loss, applies to a payment made by an accident insurance company on its policy to a person wrongfully injured by another. The rule in case of fire insurance risks is well settled. *Swarthout v. C. & N. W. R. Co.* 49 Wis. 625, 6 N. W. 314; *Hustisford F. Mut. Ins. Co. v. C., M. & St. P. R. Co.* 66 Wis. 58, 28 N. W. 64; *Wunderlich v. C. & N. W. R. Co.* 93 Wis. 132, 66 N. W. 1144. It must be conceded that if under such rule the insurance company in

question by equitable assignment succeeded to the right of the plaintiff against the defendant to the amount paid by it, it is a necessary party to the litigation and the demurrer should have been sustained. *Pratt v. Radford,* 52 Wis. 114, 8 N. W. 606; *Wunderlich v. C. & N. W. R. Co., supra; Allen v. C. & N. W. R. Co.* 94 Wis. 93, 68 N. W. 873; *Sims v. Mut. F. Ins. Co.* 101 Wis. 586, 77 N. W. 908.

The general effect of the cases cited is that upon payment by an insurance company to another on its contract of fire insurance on account of a loss caused by a third person, in case of its only partially repairing the damage suffered by such other, it becomes by equitable assignment the owner, *pro tanto,* of the claim of such other against such person and both parties interested are necessary to an action to enforce payment of compensation by such person, and in case the payment is a full legal equivalent for the injury, the entire claim of such other by such assignment passes to the insurance company, leaving the former no cause of action against such person.

The doctrine aforesaid is based on the theory that in a contract of fire insurance the company is a surety, and so upon the general equitable principles of subrogation when it, as indemnitor, pays a loss caused by the negligence of a third person its relation with such person is that of surety and principal obligor. It has all the rights against the latter which the principal creditor, so to speak, formerly had. The insured has one claim which he can enforce against either party, but he can have but one satisfaction, and the party primarily liable is relievable only by assuming the burden.

The right of the insurance company in the circumstances suggested, as stated by text-writers,

"is based upon the equitable doctrine that where one has been obliged to pay money to another by the nonfeasance or misfeasance of a third, who, being at fault, ought to bear the loss, the party so paying, as by his direct obligation towards

the party suffering the loss he may be compelled to do, shall be allowed, indirectly and through the right which the injured party had, to compel the wrongdoer to bear the burden which was imposed by his fault; although between him and the wrongdoer there is no direct relation upon which to found a cause of action." 2 May, Ins. (4th ed.) § 454.

Counsel for appellant, though manifestly having made a careful study of the subject, has been unable to produce any authority for extending the principle stated to injuries to the person caused by wrongful conduct of another, where the person injured holds a policy of casualty insurance in whole or in part covering the loss.

The case seems to turn on whether a contract of casualty insurance is one of indemnity like that of fire insurance. While there is some conflict, by the great weight of authority a life insurance contract is not of that kind but is strictly a valued policy; a stipulation to pay a sum certain upon the happening of a specified contingency. Bacon, Ben. Soc. & Life Ins. § 163; Joyce, Ins. § 26; *Scott v. Dickson,* 108 Pa. St. 6; *Emerick v. Coukley,* 35 Md. 188. Under such a policy the amount payable has no necessary relation to damages actually suffered by the beneficiary. The insured buys and pays for the right to have from another a specified sum upon the happening of a specified event. Payment for the insurance is in the nature of an investment. The money value of the thing covered by the insurance does not enter into the transaction at all.

A policy of casualty insurance, ordinarily, has much the same features as one of life insurance, though, it is true, it more nearly than one of life insurance has the indemnity feature. The amount stipulated to be paid is a fixed sum as to each particular injury specified or is computable without any such definite data as in case of the loss of property.

Our attention has been called to cases where it has been held that though no actual loss is suffered or the loss is par-

tially repaired by voluntary contributions of a friendly or charitable nature, as in *Globe Acc. Ins. Co. v. Helwig,* 13 Ind. App. 539, 41 N. E. 976; *Hart v. Nat. M. Acc. Asso.* 105 Iowa, 717, 75 N. W. 508, and *Evansville & T. H. R. Co. v. Holcomb,* 9 Ind. App. 198, 36 N. E. 39, such reparation does not inure to the benefit of any party liable for the loss. The principle thereof does not seem to apply to a situation where the payment is by one liable for the damage. In the latter case there is good reason for applying the doctrine of subrogation, while in the former there is none whatever. So such cases are not helpful in reaching a right conclusion as to the one in hand.

Counsel for appellant recognizes that in *Ætna L. Ins. Co. v. Parker & Co.* 30 Tex. Civ. App. 521, 72 S. W. 621, the general question we have here was decided adversely to his contention, but argues that the logic of the opinion upon which the decision rests is unsound. Such decision was approved by the supreme court of Texas, as indicated by counsel for respondent. 96 Tex. 287, 72 S. W. 168, 580, 621. The court reasoned that casualty insurance is more like life than like fire insurance and that it should be classed with the former rather than with the latter as to the right of subrogation, because in case of casualty insurance the right of the assured is not determinable by any definite rule for computing the money equivalent for the damages, as in case of fire insurance; that the right to recover the stated or other sum is a property right bought and paid for by the assured as in case of life insurance, not a mere right to indemnity for a definitely ascertainable pecuniary loss. If it be true that in the absence of some stipulation to the contrary a contract of casualty insurance is not for the reasons stated by the Texas court one of indemnity giving rise in the circumstances of this case to the right of subrogation as against the party wrongfully causing the injury, and yet the parties might give it that character by a stipulation to that effect, so far as we can discover there was no such stipulation in the contract in ques-

tion. It is alleged in the answer that the respondent "at the time he was injured held a policy of insurance or contract of indemnity against personal bodily injury," etc., and "that he recovered $2,500 for the injury in question pursuant to such contract," though it is quite plain that what is pleaded as to the policy being a contract of indemnity is not based on any stipulation therein to that effect, but is the pleader's idea of the legal effect of a policy of casualty insurance. We are not inclined to adopt counsel's view, but rather to hold that such a policy is an investment contract giving to the owner or beneficiary an absolute right, independent of the right against any third party responsible for the injury covered by the policy; that if such a company desires protection against loss caused by the wrongs of third persons who would ordinarily be liable they must do so by the contracts they make; that in the absence of a feature expressly making the policy of insurance an indemnity contract, it should not be regarded as such, but held to be an investment contract in which the only parties concerned are the insurer and the assured or the beneficiary. It follows that the order sustaining the demurrer must be affirmed.

By the Court.—So ordered.

HAMANN, Administratrix, Respondent, vs. MILWAUKEE BRIDGE COMPANY, Appellant.

May 9—June 5, 1908.

Master and servant: Death of servant: Unsafe method of work: Evidence: Custom: Knowledge of danger: Failure to give warning: Instructions to jury: Damages recoverable by widow: Appeal: Costs for printing supplemental case.

1. **In an action to recover for death of an employee alleged to have been caused by negligence of defendant in the unloading of a heavy machine from a car, evidence of the feasibility of using certain precautions and safeguards against the overturning of the machine which caused the injury, and that they were often**

applied by others, was sufficient to warrant a finding by the jury that the manner of unloading the machine was not reasonably safe. It was not necessary to show a general custom to use such precautions.

2. The evidence in such case is *held* to warrant the inference of a causal relation between the perils set forth in the complaint (including narrowness and irregularity of the base of the machine) and the overturning of the machine which caused the injury.

3. It was not necessary to a recovery in such case that the jury should find that defendant was negligent in adopting the method of unloading the machine or that its lack of reasonable safety was the proximate cause of the injury. The perils of the method adopted having been known to defendant's superintendent some considerable time before the machine overturned, and not obvious to the deceased, it became his duty to notify the deceased thereof; and findings that he failed to do so, that such failure was the proximate cause of the injury, and that the deceased was not guilty of contributory negligence, were sufficient to establish defendant's liability.

4. Refusal to give instructions as to the weight of certain isolated evidentiary facts or circumstances was not error.

5. Refusal to give requested instructions which are adequately covered by the general charge is not error.

[6. Whether in an action based on negligence in unloading a heavy machine from a car to the floor of defendant's factory the evidence as to a general custom to use certain precautions should be confined to what was done by manufacturers and dealers in and purchasers of machinery of that character, or might extend to the custom among movers of such machinery, not determined.]

7. As preliminary to testifying to precautions which he had known to be used by others and to custom, a witness was permitted to testify to his experience in unloading a machine somewhat similar to the one in question. *Held*, not error, such testimony having a bearing upon the qualifications of the witness, and there being no request to limit its effect.

8. It was not prejudicial error to permit a witness for plaintiff to testify that certain similar machines received at the same time as the one in question had been unloaded by defendant by means of a steam crane, and to state why the crane was not used for this machine,—the purpose of the evidence being apparently to show that the deceased had no knowledge of the dangers of the method adopted for unloading the machine in question.

9. In an action by a widow suing as administratrix to recover for the death of her husband, evidence as to the health of the plaintiff and as to the number of her children was admissible, the jury being properly cautioned that she could recover only for the pecuniary damage resulting to herself from the death.
10. Costs are not allowed to respondent herein for printing of a supplemental case which was not necessary to a fair presentation of the merits of the appeal.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action, considered upon a first appeal and reported in 127 Wis. 550, 106 N. W. 1081, was tried a second time, the narrative of conditions and events being substantially similar to that previously described. The measurements and dimensions of the machine were more accurate, locating the center of gravity upon the longitudinal center and at a height of thirty-four inches above the base and about thirty-two inches from the rear and higher end of the machine as it descended the skids. Its place at moment of capsizing was with its lower end about one foot from the floor. Additional evidence was offered of some subsidence of the planks which served as skids, of a slight irregularity in the cast-iron base of the machine, so that the middle portion thereof was lower than the two sides by something more than a quarter of an inch, whereby was claimed to have been produced a lateral oscillation, and there was evidence tending to show that the machine did in fact oscillate as it descended the skids and that the skidway was unequal in strength and irregular in surface and sagged under the weight of the machine. There was also evidence of a tendency at one time in the descent to vary from the center of the skidway towards the east, and there was considerable more evidence of a custom by others in unloading such a machine to build a frame below so that the width of the base would be uniform; also to attach lateral guy lines. Evidence was given which it was claimed tended to prove that at the time of the accident all of the rollers were within

the limits of the narrow sixteen-inch base and none of them engaged under the broader base at either end.

A special verdict of six questions was rendered to the following effect: (1) The manner of unloading the machine from the car to the floor was not reasonably safe; (2) such manner of unloading was not open and obvious to the deceased; (3) there was failure on the part of defendant to instruct the deceased as to the danger of the machine tipping over while being unloaded from the car; (4) such failure to instruct was the proximate cause of the injury; (5) deceased was guilty of no contributory negligence; and (6) damages as upon first trial, $3,500. After proper motions to raise the sufficiency of evidence on these various questions had been overruled, judgment was rendered for plaintiff upon the verdict, from which the defendant appeals.

Charles A. Vilas, for the appellant.

For the respondent there was a brief by *Houghton & Neelen,* and oral argument by *F. W. Houghton.*

DODGE, J. The appellant first contends that there was no evidence from which the jury could find that the method adopted for lowering the machine in question was not reasonably safe. It supports such contention almost entirely upon the ground that plaintiff failed to prove that the general custom of doing such work among other manufacturers was discordant from the method adopted by the defendant. Such failure might be conceded *arguendo,* and still appellant's main contention fail to result. When the facts are made known to a jury, and especially when it is proved that there is a feasible safer method frequently or sometimes adopted by others for performing the same work, a situation is presented for the exercise of judgment as to whether the method pursued was reasonably safe. True, this may be supplemented by proof of a general custom to exercise greater precautions or adopt greater safeguards, but such proof is by no means necessary

to the establishment that the mode adopted by defendant was unreasonably perilous, or, in other words, not reasonably safe. *Powalske v. Cream City B. Co.* 110 Wis. 461, 467, 86 N. W. 153; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409. The authorities cited by appellant are to the position that, when it is proved that an apparatus or a method of procedure is unnecessarily dangerous, the party liable may avert the conclusion that it is unreasonably so by proving a general custom amongst others similarly situated to use such appliances or such methods. *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563; *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689. There was abundant proof of the feasibility of using certain precautions and safeguards against the peril from which plaintiff's decedent suffered, and that they were often applied by others; and even if such evidence did not go to the extent of proving a general custom, it was sufficient to warrant a finding of the jury by the answer to the first question of the special verdict that the method was not reasonably safe.

The next contention is that a verdict should have been directed for the defendant for the reason suggested in the opinion of this court upon the former appeal, namely, that there was no evidence to justify any reasonable inference that any of the perils pointed out in the method of doing the work, or all of them together, in any wise caused the machine to capsize and to injure the deceased; that any conclusion to that effect must have been the result of mere conjecture and not rational inference. We cannot sustain this contention. In the statement of facts we have pointed out many respects in which the evidence on the last trial varied from that on the former, in that it tended to show both opportunities for the narrowness and irregularity of the base to cause the machine to tip over, and also to prove the probability, within ordinary natural events and influences, that they did in this instance cause it. We do not think it necessary to go further than

state our conclusion that the evidence did present justification for a rational inference of causal relation between the perils set forth in the complaint and the overturning of the machine.

In close connection with this discussion is a complaint of the form of the special verdict and insufficiency thereof to support the judgment. In this respect it must be borne in mind that it was not necessary for the jury to find either that the defendant was negligent in adopting the method or that the lack of reasonable safety characterizing such method was the proximate cause of the injury. As pointed out in our former decision, the perils of that method being unquestionably known to defendant's superintendent at least by the time the machine had descended one half the distance to the floor and some considerable time before it capsized and injured the deceased, it became his duty on behalf of the defendant, in the exercise of due care, to notify deceased thereof. This the jury has found he failed to do and that such failure was the proximate cause of the injury. Such findings have support in the evidence and of themselves present a basis from which the defendant's liability for the damages results in the absence of contributory negligence, which the verdict negatives.

Error is assigned upon several refusals to give instructions requested by defendant. The first two of these assignments are predicated upon the refusal of the court to select certain isolated evidentiary facts or circumstances and instruct the jury with relation to the weight thereof. Without discussing their propriety had the trial court seen fit to give them, we must hold, in accordance with numerous decisions, that his refusal to thus invade the province of the jury, or to discuss the effect of segregated items of evidence disassociated from other facts and circumstances affecting their weight, was not error for which the judgment can be reversed. *Seiler v. State,* 112 Wis. 293, 303, 87 N. W. 1072; *Duthey*

v. State, 131 Wis. 178, 190, 111 N. W. 222; *Till v. State,* 132 Wis. 242, 247, 111 N. W. 1109.

An instruction was requested that, in weighing the evidence as to the existence of a general custom to use certain precautions, the jury must confine themselves to what was done by manufacturers and dealers in and purchasers of machinery, and that any custom among movers of machinery should have no bearing. We very gravely doubt the correctness of such rule, for it seems to us that a man whose business is to move or unload such machines may often very well be considered as operating under similar circumstances to the proprietor of a factory performing the same work. But apart from such consideration, we think it plain that the court adopted appellant's view of the law on this subject and adequately expressed it to the jury in charging them that the proofs which they might consider must be confined to the custom "of manufacturers handling like machines under like circumstances."

Numerous assignments of error are based upon the admission of evidence. A witness gave testimony with reference to his experience in unloading a machine of more or less similarity to the one in question. This was done in the course of describing his experience as preliminary to testimony as to precautions which he had known to be exercised by others and to custom. It bore upon the qualifications of the witness, and we think was entirely within the discretion of the trial court to admit on that subject. No request was made to limit its effect.

A witness was permitted to testify that certain similar machines received at the same time with this and unloaded by the defendant were unloaded by means of a steam crane, and then over objection he was permitted to testify why that crane was not used in unloading this machine, giving a perfectly cogent reason. The evidence, if it had any effect, certainly tended to relieve the defendant from a charge of negligence

in not using the crane on this machine, and we are unable to conceive any prejudice which could have resulted to the defendant. Apparently the purpose of the evidence was to show that the deceased had never before been called upon to aid in unloading such a machine in the manner adopted on this occasion, to disprove his knowledge of the danger. We can discover no error in these rulings.

Error is assigned upon the admission of evidence as to the health of plaintiff and as to the number of her children. The propriety of admitting such evidence has been declared by this court. *Lawson v. C., St. P., M. & O. R. Co.* 64 Wis. 447, 24 N. W. 618; *Abbot v. McCadden,* 81 Wis. 563, 51 N. W. 1079. The jury were properly cautioned that the plaintiff was entitled to recover only for the pecuniary damage resulting to herself from the death of her husband.

Numerous other detail errors are assigned upon the admission of specific items of testimony, but they do not seem to us to present anything of sufficient gravity or prejudice to warrant discussion in this opinion. We are satisfied they present no warrant for reversal.

A supplemental case printed by the respondent seems to us quite unnecessary to a fair presentation of the merits of this appeal. No costs will be taxed therefor.

By the Court.—Judgment affirmed.

WEBER, by guardian *ad litem,* Respondent, vs. SWALLOW, Appellant.

May 9—June 5, 1908.

Automobiles: Bicycles: Use of streets: Collision: Negligence.

1. As to their reciprocal duties when approaching one another at the intersection of streets a bicyclist and an automobilist are governed by the common-law rule, each being bound to exercise reasonable care.

2. Findings of the jury that an automobilist in such a case was negligent are *held* to be sustained by the evidence.
3. Plaintiff while riding a bicycle westward on the north side of a street collided at the intersection of a cross street with an automobile which had just crossed from the south side of the street, behind an eastbound street car, for the purpose of going north on the cross street. Upon the evidence it is *held* that plaintiff was guilty of contributory negligence either in failing to keep a proper lookout or in riding so near the street car and at such a speed as to render the collision inevitable.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Some time after 6 o'clock on the evening of June 25, 1906, plaintiff, a boy between sixteen and seventeen years of age, was riding a bicycle westward along the north side of Wisconsin street in the city of Milwaukee. Defendant was coming eastward on the south side of the street in an automobile, and shortly before coming to Jefferson street, which intersects Wisconsin street at right angles, turned northward for the purpose of going north on Jefferson street. He turned directly back of a street car going eastward on Wisconsin street. Within the square of the intersecting streets the plaintiff's bicycle and the defendant's automobile collided, and the plaintiff was thrown against and over the lamp on the left side of the automobile, breaking the lamp, and falling to the ground some feet west of the point of collision. Plaintiff's leg was broken and he was otherwise bruised and injured, and as a result he suffered injuries which in some respects appear to be permanent. Plaintiff brought his action for damages, alleging that his injuries were due to defendant's negligence.

The evidence is in conflict as to the place where the collision occurred and as to the exact location of each party on the intersecting streets. There is evidence tending to show that plaintiff was riding his bicycle at the usual rate of speed and in the usual manner. Other evidence tends to show that

he was riding rather fast and was leaning over his handle-bars. He testified that he was within a few feet of the north curbstone. Other witnesses locate him at points from near the north curbstone to within a little north of the north rail of the north track of the street-car line. If he was at the extreme point to the north, as testified to by himself, the automobile must have emerged from behind the car into plaintiff's view at a point from twenty-five to thirty feet distant from the point of collision, and plaintiff must have been nearly the same distance east of the point of collision. If plaintiff was at the point nearest the north street-car track referred to in the evidence, then the automobile emerged from behind the car into plaintiff's view when only a few feet distant from the point of collision, and plaintiff's position relative to the point of collision was practically the same distance.

The jury rendered a special verdict and found (1) that the driver of the automobile ought, in the exercise of ordinary care, to have seen plaintiff in time to have avoided collision with him; (2) that under the circumstances of the case he ran the automobile at an unreasonable rate of speed at or just prior to the collision; (3) that his negligence in these respects was the proximate cause of the injury; and (4) that plaintiff was free from the want of any ordinary care which contributed to the injuries. The court awarded plaintiff judgment on the verdict for the damages assessed and for his costs. This is an appeal from such judgment.

Charles A. Vilas, for the appellant, cited sec. 1636—51, Stats. (Supp. 1906; Laws of 1905, ch. 305, sec. 5); *Mason v. West,* 61 App. Div. 40, 70 N. Y. Supp. 478; *Hannigan v. Wright,* 5 Pennewill (Del.) 537, 63 Atl. 234; note to *Christy v. Elliott,* 216 Ill. 31, in 1 L. R. A. N. S. 215; *Gregory v. Slaughter* (Ky.) 99 S. W. 247, 8 L. R. A. N. S. 1228; *Polsky v. N. Y. Transp. Co.* 96 App. Div. 613, 88 N. Y. Supp. 1024; *West v. N. Y. Transp. Co.* 94 N. Y. Supp. 426; *Lightfoot v. Winnebago T. Co.* 123 Wis. 479, 102 N. W. 30;

Wills v. Ashland L., P. & St. R. Co. 108 Wis. 255, 84 N. W. 998.

For the respondent there was a brief by *McCabe & Dahlman,* and oral argument by *Louis M. Dahlman.* They cited *Thies v. Thomas,* 77 N. Y. Supp. 276; *Buscher v. N. Y. Transp. Co.* 94 N. Y. Supp. 798; *Kathmeyer v. Mehl* (N. J. Law) 60 Atl. 40; *Spina v. N. Y. Transp. Co.* 96 N. Y. Supp. 270.

SIEBECKER, J. The plaintiff and the defendant were both using the street crossing as travelers, the former with his bicycle and the latter with his automobile. Each had a right to use it for this purpose with a reasonable regard to the rights of the other in his use of it. Under such circumstances the common-law rule controls them in their mutual duties, namely, each party was in duty bound, in view of the place and circumstances, to exercise reasonable care in the use of the crossing.

The jury found defendant guilty of negligence, that such negligence was the proximate cause of plaintiff's injuries, and that plaintiff was free from any want of ordinary care contributing to produce them. The defendant urges that the evidence shows that he was not guilty of any negligence proximately causing the collision and the consequent injuries to plaintiff. We do not find the evidence clearly and indisputably to this effect. The jury were fully warranted in finding that defendant's manner of using the street was wanting in ordinary care in view of his duty to so use it as not to collide with other travelers, and that he exceeded a reasonable rate of speed just prior to and at the time of the collision.

It is further claimed by the defendant that plaintiff was guilty of negligence *per se* in his use of the crossing and that such negligence contributed to produce his injuries. It is manifest from the evidence adduced that plaintiff either rode

near the north curbstone of Wisconsin street, near the outside rail of the north street-car track, or on a course between these extremes. If he was riding near the curb, then it is apparent that he had the same opportunity to see defendant approaching to pass over the crossing that defendant had of seeing him and that he had an equal opportunity of avoiding a collision. He had an open view to see defendant as soon as the automobile emerged from behind the car. At this time plaintiff and defendant were so nearly equidistant from the point where they collided that plaintiff, in the exercise of ordinary care, could have observed defendant approaching and have avoided colliding with him. We are led to the conclusion that if plaintiff was riding near the curb he was guilty of a want of ordinary care in not observing defendant and avoiding running into the automobile and that such negligence contributed to produce the collision. If, on the other hand, plaintiff rode so near the street car that he was unable to see defendant in time to avoid colliding with his automobile after it emerged from behind the passing car, then he was guilty of culpable negligence, because he was bound to anticipate that the street crossing might be used by travelers either on foot or in vehicles, whose safety he necessarily imperiled by thus using the road. Such a situation demanded of him a high degree of care and watchfulness for the safety of others by reason of the great liability of colliding with and injuring them. Such conduct by plaintiff was imminently dangerous to others, and therefore was under the circumstances a want of that care that ordinarily careful persons exercise under the same or similar circumstances. From the physical facts surrounding the collision it appears that whichever way plaintiff used the street just before and at the time of the collision proves him negligent either in failing to keep a proper lookout and thus avoiding a collision with the defendant, or in so using the street near a passing street car in a manner and at a rate of speed as made it inevi-

table that he would collide with travelers emerging from behind street cars and attempting to pass over the crossing streets. It follows from the facts adduced that under the most favorable inference permissible respecting plaintiff's use of the street he was guilty of negligence *per se* which contributed to produce the injuries of which he complains, and that the court erred in denying defendant's motion to direct a verdict in the case and to dismiss the complaint.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment dismissing the complaint.

PFEIFFER and another, Respondents, vs. MARSHALL and another, Appellants.

May 11—June 5, 1908

Contracts: Fraud: Waiver: Election to affirm: Action for reformation.

1. For two years after discovering the falsity of representations (as to value) by which they had been induced to make a contract for the purchase of land, the purchasers prosecuted an action for reformation of the contract upon grounds not connected with such fraud. *Held*, that they thereby ratified and elected to stand upon the contract actually made and, although judgment went against them in the reformation action, they cannot set up the fraud in avoidance of the contract.
2. So far as waiver of the fraud was concerned, it was wholly immaterial whether the contract was reformed or not, since the same fraud induced the making of the contract whether it was in fact as expressed in the writing or was as claimed by the purchasers.
3. Taking any step to enforce a contract is a conclusive election not to rescind it on account of anything then known to the party so moving, and he will not be heard to say that he did not intend to waive.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The action was brought to recover interest on a note given for the purchase of an interest in real estate under a land contract. The complaint alleges in effect that on the 7th and 8th of May, 1903, the plaintiffs by land contracts sold to the defendants an undivided one-third interest in 28.21 acres of land, for which the defendants agreed to pay $15,000 within five years and $100 annually towards the taxes on such real estate during said five years; that defendants paid two instalments of interest, to wit, $375 November 7, 1903, and $375 May 7, 1904, and also $100 towards the taxes of 1903; that there is due and unpaid on the note and land contracts four instalments of interest of $375 each and $200 taxes.

The answer admits the ownership of the real estate, the signing of the note and contracts, the payment of $750 interest and $100 taxes, and that no other payments were made by the defendants. It further alleges that the defendants were induced to sign the note and contracts by reason of false and fraudulent representations made to them by the plaintiff *Pfeiffer,* acting for himself and his coplaintiff; that the fraudulent representations so made were substantially as follows: That the value of the real estate was more than $50,000, when in truth and in fact its real value was not to exceed $25,000, as was then known by the plaintiff *Pfeiffer;* that the Gentlemen's Driving Club, an association of Milwaukee, had offered $52,000 for such real estate and had agreed to take the same as soon as they could raise the money; that negotiations were then pending between *Pfeiffer* and said Gentlemen's Driving Club, when in truth such association had never made any offer for such real estate; that one Capt. Merryman had paid for real estate nearly adjoining said 28.21 acres on the east the sum of $3,000 for one acre, when in truth he had paid but $2,500 for about three acres, which was then well known to *Pfeiffer;* that the real estate adjoining on the west was worth $2,000 an acre and the owners were holding it for $2,000 to $2,500 an acre, when in truth such real estate was not held by its owners for more than

$1,000 an acre, as was then well known to said *Pfeiffer;* that the soil of such real estate was rich and fertile and easy to cultivate and like a garden, when in truth the soil was lean and sterile, full of noxious weeds, and hard to cultivate, as was then well known by said *Pfeiffer.*

It is further alleged that the defendants, relying upon such false and fraudulent representations, were induced to sign the note and contracts, and through the further fraud of said *Pfeiffer* substantially as follows: That he falsely and fraudulently represented to the defendants that there was a mortgage of $15,000 on the real estate in question drawing five per cent. interest, which *Pfeiffer* had to pay, together with $100 taxes per annum, and that he had no income except $1,000 a year salary; that he proposed if the defendants would assist him in selling the real estate by paying the interest on the mortgage from year to year and $100 taxes he would give them the use of such real estate during the time they should pay interest and taxes, and when such real estate was sold he would give them all over $45,000 up to $50,000 of the proceeds and one third of all over $50,000, and that such real estate would be sold for more than $50,000; that defendants accepted such proposition and agreed to pay interest and taxes to the amount of $850 per annum; that thereupon *Pfeiffer* fraudulently caused to be prepared a land contract and presented the same to defendants for signature May 7, 1903; that defendants refused to sign, and on the next day a modification was procured, and through the false and fraudulent representations the note and contracts were signed under the belief that such modified agreement contained the real agreement between the parties. The note for the purchase price was given on the 8th, and the land contract modified by providing, among other things, that the parties of the second part, defendants herein, should have the exclusive use of the entire tract of 28.21 acres for a term of five years, using the same as tenants of plaintiffs during said term, or for such period thereof as defendants should con-

tinue to pay the interest and taxes, said taxes not to exceed $100 per annum, and that on request in writing the plaintiffs should grant an extension of the contracts for five years. And it was further agreed in said modification of the land contract that if at the end of said five years the second parties, defendants herein, should request to be released from the agreement and further liability and at a time when they were not in default for payment of interest or taxes, the first parties should release them from any further liability on said contract.

It is alleged that about November 1, 1903, the defendants notified *Pfeiffer* that they would terminate their agreement May 7, 1904, and *Pfeiffer* then informed them that the agreement could not be terminated for five years; that on March 18, 1904, the defendants demanded in writing that the contract be reformed to correspond with the actual agreement so as to provide among other things that the land contract and agreement between the parties be subject to termination at the election of the second parties, defendants herein, at the end of any year. In April, 1904, the defendants commenced an action to reform the land contracts executed May 7 and 8, 1903. This reformation action was prosecuted and finally resulted in judgment for defendants, plaintiffs herein, which judgment was entered September 20, 1906. It is further alleged that the minds of the parties never met on the agreement as written and defendants never assented thereto.

The facts were set up in the answer at great length by way of defense and also by way of counterclaim. Plaintiffs denied the allegations of the counterclaim. On the trial the defendants withdrew the counterclaim and amended the prayer of the answer so as to ask that the complaint be dismissed on the merits with costs. The case was tried upon the issues joined and the following verdict returned:

"(1) Did the plaintiff *John C. Pfeiffer* represent to the defendants or either of them, as an inducement to the making of the contract in question by the defendants, that the land

described in the complaint in this action was rich, fertile, and very productive, and free from noxious weeds? *A.* Yes.

"(2) If you answer the first question 'Yes,' was such representation untrue? *A.* Yes.

"(3) If you answer the second question 'Yes,' did the plaintiff *Pfeiffer* know, or ought he to have known, that such representation was false? *A.* Yes.

"(4) If you answer the third question 'No,' did the plaintiff *Pfeiffer* make such representation recklessly, without any knowledge on the subject? *A.* ——.

"(5) If you answer either the third or fourth question 'Yes,' did the defendants rely upon such representation as true and were they induced thereby to enter into said contract? *A.* Yes.

"(6) If you answer the fifth question 'Yes,' did the defendants, in relying upon such representation as true and entering into said contract, exercise due and proper vigilance? *A.* No.

"(7) If you answer the second question 'Yes,' when did the defendants first obtain knowledge of the falsity of such representation? *A.* (by court). During the summer of 1903.

"(8) Did the plaintiff *Pfeiffer* represent to the defendants or either of them, as an inducement to the making of the contract by the defendants, that the premises in question were worth more than $50,000? *A.* Yes.

"(9) If you answer the eighth question 'Yes,' was such representation untrue? *A.* Yes.

"(10) If you answer the ninth question 'Yes,' did the plaintiff *Pfeiffer* know, or ought he to have known, that such representation was false? *A.* Yes.

"(11) If you answer the tenth question 'No,' did the plaintiff *Pfeiffer* make such representation recklessly, without any knowledge on the subject? *A.* ——.

"(12) If you answer either the tenth or eleventh question 'Yes,' did the defendants rely upon such representation as true, and were they induced thereby to enter into said contract? *A.* Yes.

"(13) If you answer the twelfth question 'Yes,' did the defendants, in relying upon such representation as true and entering into said contract, exercise due and proper vigilance? *A.* No.

"(14) If you answer the ninth question 'Yes,' when did

the defendants first obtain knowledge of the falsity of said representation? *A.* In July, 1904.

"(14*a*) If you answer the ninth and thirteenth questions 'Yes,' ought the defendants, in the exercise of due and proper vigilance, to have discovered that said representation was false before they paid the interest due May 7, 1904? *A.* Yes.

"(15) Did the plaintiff *Pfeiffer* represent to the defendants or either of them, as an inducement to the making of the contract by the defendants, that the Gentlemen's Driving Club had offered him the sum of $52,000 for said land? *A.* Yes.

"(16) If you answer the fifteenth question 'Yes,' was such representation untrue? *A.* Yes.

"(17) If you answer the sixteenth question 'Yes,' did the defendants rely upon such representation as true, and were they induced thereby to enter into said contract? *A.* Yes.

"(18) If you answer the seventeenth question 'Yes,' did the defendants, in relying upon such representation as true and entering into said contract, exercise due and proper vigilance? *A.* No.

"(18*a*) If you answer the seventeenth and eighteenth questions 'Yes,' ought the defendants, in the exercise of due and proper vigilance, to have known the falsity of said representation before they paid the interest due May 7, 1904? *A.* Yes.

"(19) If you answer the sixteenth question 'Yes,' when did the defendants first obtain knowledge of the falsity of such representation? *A.* Between November, 1906, and April, 1907.

"(20) Did the plaintiff *Pfeiffer* represent to the defendants or either of them, as an inducement to the making of the contract by the defendants, that $3,000 had been paid for one acre near the plaintiff's land to the east (meaning Capt. Merryman's land)? *A.* Yes.

"(21) If you answer the twentieth question 'Yes,' was such representation untrue? *A.* Yes.

"(22) If you answer the twenty-first question 'Yes,' did the plaintiff *Pfeiffer,* when he made such representation, know or ought he to have known that it was false? *A.* Yes.

"(23) If you answer the twenty-second question 'No,' did

the plaintiff *Pfeiffer* make such representation recklessly, without any knowledge on the subject? *A.* Yes.

"(24) If you answer either the twenty-second or twenty-third question 'Yes,' did the defendants rely upon such representation as true, and were they induced thereby to enter into said contract? *A.* Yes.

"(25) If you answer the twenty-fourth question 'Yes,' did the defendants, in relying upon such representation as true and entering into said contract, exercise due and proper vigilance? *A.* Yes.

"(25*a*) If you answer the twenty-first and twenty-fifth questions 'Yes,' ought the defendants, in the exercise of due and proper vigilance, to have known that said representation was false when they paid the interest due May 7, 1904? *A.* Yes.

"(26) If you answer the twenty-first question 'Yes,' when did the defendants first obtain knowledge of the fact that such representation was not true? *A.* Within last three or four months.

"(27) Did the plaintiff *Pfeiffer* represent to the defendants or either of them, as an inducement to the making of the contract by the defendants, that the land adjoining plaintiff's land on the west (Shenner's land) had been sold for $1,500 and was held by the owner at $2,000 to $2,500 an acre? *A.* Yes.

"(28) If you answer the twenty-seventh question 'Yes,' was such representation untrue? *A.* Yes.

"(29) If you answer the twenty-eighth question 'Yes,' did the plaintiff *Pfeiffer,* when he made such representation, know or ought he to have known that it was false? *A.* Yes.

"(30) If you answer the twenty-ninth question 'No,' did the plaintiff *Pfeiffer* make such representation recklessly, without any knowledge as to its truth or falsity? *A.* ——.

"(31) If you answer the thirtieth question 'Yes,' did the defendants rely upon such representation as true, and were they induced thereby to enter into such contract? *A.* Yes.

"(32) If you answer the thirty-first question 'Yes,' did the defendants, in relying upon such representation and entering into said contract, exercise due and proper vigilance? *A.* Yes.

"(32*a*) If you answer the twenty-eighth and thirty-sec-

ond questions 'Yes,' ought the defendants, in the exercise of due and proper vigilance, to have known that said representation was false at the time they paid the interest due May 7, 1904? *A.* Yes.

"(33) If you answer the twenty-eighth question 'Yes,' when did the defendants first obtain knowledge of the fact that such representation was not true? *A.* Within three or four months.

"(34) If the court should find that defendants were induced to said contract by fraud, did the defendants suffer damage thereby? *A.* (by court). Yes."

Demand for reformation, prosecution of reformation suit to final judgment, and knowledge of value of premises are established by the verdict and evidence. On motion of the defendants the court changed the answer to the eighteenth question from "No" to "Yes," and struck out the answer to the twenty-third question. Judgment was rendered upon the verdict in favor of the plaintiffs, from which this appeal was taken.

For the appellants there was a brief by *Houghton & Neelen,* and oral argument by *F. W. Houghton.*

For the respondents there was a brief by *Perry & Kroesing* and *George E. Morton,* and oral argument by *Mr. Morton* and *Mr. C. B. Perry.*

KERWIN, J. Upon the established facts we see no escape from affirmance of the judgment, and therefore consideration of many of the alleged errors discussed by the appellants is rendered unnecessary. Aside from the findings of the jury set out in the statement of facts to the effect that the defendants knew, or by the exercise of due vigilance ought to have known, that the representations were false, it is established without substantial dispute that in July, 1904, the defendants had knowledge that the representations respecting the value of the land in question were false and that such value was not $50,000, but only about $22,000. Notwithstanding,

the defendants continued to prosecute the action for reformation of the contract for nearly two years after obtaining such knowledge and until judgment was rendered against them in the action. Now the question arises whether such action in the prosecution of the reformation suit did not amount to a waiver of the fraud or an election to stand upon the contract made. The false representations relied upon to reverse the judgment are: (1) The soil was rich and fertile, etc.; (2) the value of the land was more than $50,000; (3) the Gentlemen's Driving Club had offered him $52,000 for such land; (4) $3,000 had been paid for one acre near the plaintiffs' land to the east, meaning the Merryman land; (5) the land adjoining plaintiffs' land on the west had been sold for $1,500 and was held by the owner at $2,000 to $2,500 an acre.

The jury found that these representations were made, and that plaintiffs knew, or ought to have known, they were false, and that they induced the making of the contract, but that defendants did not exercise due vigilance in relying upon the representations as to the character of the soil, value of the property, and offer of the Gentlemen's Driving Club; that they did exercise due vigilance in relying upon the representations as to the price paid for the Merryman tract and the Shenner tract, and what the Shenner tract was held at; that the defendants, in the exercise of due vigilance, ought to have known the falsity of the representations as to value, offer of Gentlemen's Driving Club, price paid for the Merryman tract, price paid for the Shenner tract, and what the Shenner tract was held at when they paid the interest May 7, 1904. The jury also found upon sufficient evidence that the defendants obtained knowledge of the falsity of the representations as to value of the premises in question in July, 1904. It will be seen that the value of the property was the material question, and that the other representations respecting the Merryman and Shenner tracts and offer of the Gen-

tlemen's Driving Club were evidentiary of the main fact, namely, the value of the property covered by the contract.

On March 18, 1904, the defendants served a written notice upon plaintiffs *Pfeiffer* and *Mayer* and their wives, demanding that the written agreement between the parties entered into on the 7th and 8th of May, 1903, be reformed so as to conform to the intention of the parties thereto, and provide that the defendants herein should have the use of the premises described in the agreement during the period of five years from date of the contract unless sold in less time, upon payment of interest on a $15,000 mortgage upon the property at the rate of five per cent. per annum and taxes not exceeding $100 a year, and further, among other things, that the agreement be subject to termination at the end of any year at the election of the second parties, defendants herein, defendants to acquire or have no title to the premises, but to forfeit all moneys paid in the event of termination of the contract by them before the expiration of five years. On April 1, 1904, an action was commenced to reform the agreement in accordance with the demand in such notice, and the defendants in that action, plaintiffs here, answered, denying any mistake or right of reformation, and averring that the agreement reduced to writing on the 7th and 8th of May, 1903, expressed the true agreement of the parties. On or about May 6, 1906, the defendants here offered by letter to surrender possession of the premises on the alleged ground that they had a right under the contract to terminate it at the end of any year by forfeiting amounts paid, and sent a check for $375, being the amount then due, together with the key to the premises. Plaintiffs through their attorneys acknowledged receipt of the check and key and stated that they held the key subject to the order of the defendants, and further that the plaintiffs *Pfeiffer* and *Mayer* would hold the defendants *Marshall* and *Wilbur* to the terms of their contract of May 7 and 8, 1903.

The reformation action was afterwards tried, and on September 20, 1906, judgment in favor of defendants, plaintiffs here, dismissing the complaint, entered. Afterwards a motion to reopen the reformation action and permit the service of an amended complaint was denied. Upon denial of this motion defendants here commenced an action to rescind the contract on substantially the same grounds as set up in the answer in the instant action. The action to rescind was brought on for trial some time before the present action, and after defendants rested the plaintiffs in the rescission action, defendants here, by leave of court discontinued, and an order of discontinuance without prejudice was entered on May 16, 1907. The present action was commenced in October, 1906, and came on for trial May 21, 1907.

It will be seen from the established facts that for a period of two years after discovery that the representations as to the value of the land in question were false defendants prosecuted the reformation action to judgment. This we think amounted to an affirmance and ratification of the contract and to an election to stand upon it, and after being defeated in the reformation action defendants cannot be heard to set up the fraud in order to avoid the contract. We have not deemed it necessary to consider the numerous findings of the jury in favor of the respondents further than they bear upon the questions of election and waiver. It is established without substantial dispute that defendants took and held possession of the property for at least a year under the contract, paid taxes and interest, the last interest being paid about a year after execution of the contract, and further prosecuted an action for the purpose of making certain changes in the written agreement so as to make it conform with the true agreement between the parties in the particulars heretofore referred to. This action in the prosecution of the reformation suit, we think, upon well-settled principles amounted to an election to stand upon the contract and a waiver of the

fraud, without considering other grounds urged for affirmance of the judgment below. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Kingman & Co. v. Stoddard,* 85 Fed. 740; *Conrow v. Little,* 115 N. Y. 387, 22 N. E. 346.

It is argued that the defendants did not affirm the contract or waive the fraud because they insisted that a different contract was made than the one evidenced by the writings. But they affirmed the contract actually made and asked that the writings be made to conform to the contract. The fraud induced the making of the contract, whether that was the one evidenced by the writings or the one claimed by the defendants, so that in asking reformation defendants affirmed the contract actually made and waived the fraud. Some point is made by the appellants respecting the intention of waiver, and cases are cited which it is claimed hold that waiver depends upon the intention to waive, and that where there is no intention to waive there can be no waiver. But an examination of the authorities will show that where, as here, the facts are known to the party, and he acts in affirmance of the contract with knowledge of such facts, or takes steps inconsistent with the nonexistence of the contract, he cannot be heard to say that he did not intend to waive. Taking any step to enforce a contract is a conclusive election not to rescind it on account of anything known at the time. *Conrow v. Little, supra.* In *Rasmusen v. New York L. Ins. Co.* 91 Wis. 81, 89, 64 N. W. 303, this court said:

"Doubtless, the act out of which the waiver is deduced must be an intentional act, done with knowledge of the material facts, but it cannot be necessary that there should be an intent to waive. Such a rule would allow a secret intention to defeat the legal effect of unequivocal and deliberate acts."

Intent to waive may be shown by conduct. *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476. It was wholly immaterial, so far as waiver was concerned, whether

the contract was reformed as claimed by defendants or permitted to stand as set out in the written agreement, because the same fraud induced the making of the contract whether it contained the terms claimed by defendants and not inserted in it or whether it was in fact made as written.

We see no escape from the conclusion that the action to reform, prosecuted as it was for a period of two years after discovery of the fraud, was an unequivocal affirmance of the contract and a waiver of the fraud. *Dawes v. Harness,* 44 L. J. (C. P.) 194; *Rasmusen v. New York L. Ins. Co.* 91 Wis. 81, 64 N. W. 301; *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. It follows from what has been said that the judgment of the court below was right and should be affirmed.

By the Court.—Judgment of the court below is affirmed.

SCOLLARD, Respondent, vs. BACH and another, Appellants.

May 11—June 5, 1908.

Contracts: Statute of frauds: Statement of consideration for guaranty.

In an action in which supplementary proceedings were pending, a written stipulation for settlement provided in one paragraph that defendant should pay to plaintiff a certain sum in instalments at certain dates and that "in consideration thereof and in consideration of the *promises hereinafter noted by the other parties hereto*" plaintiff should accept such payments in full satisfaction of the judgment. This paragraph was signed by plaintiff and defendant. A second paragraph in the same document was signed by two other persons, who thereby guaranteed "full performance for said plaintiff by defendant *at the times aforesaid.*" *Held,* that there was but one contract or instrument and that the consideration for the guaranty was sufficiently expressed therein to satisfy the requirements of the statute of frauds, sec. 2307, Stats. (1898).

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to the complaint.

For the appellants there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *F. A. Teall.*

Among other references upon the part of the appellants were the following: *Miami Co. Nat. Bank v. Goldberg,* 133 Wis. 175, 113 N. W. 391; subd. 2, sec. 2307, Stats. (1898); *Reynolds v. Carpenter,* 3 Pin. 34; *Taylor v. Pratt,* 3 Wis. 674; *Parry v. Spikes,* 49 Wis. 384, 5 N. W. 794; *Willard v. Bosshard,* 68 Wis. 454, 32 N. W. 538; *Twohy M. Co. v. Ryan D. Co.* 94 Wis. 319, 68 N. W. 963; *Waldheim v. Miller,* 97 Wis. 300, 72 N. W. 869; *Comm. Nat. Bank v. Smith,* 107 Wis. 574, 83 N. W. 766; *Coxe Bros. & Co. v. Milbrath,* 110 Wis. 499, 86 N. W. 174; *Klee v. Stephenson,* 130 Wis. 505, 110 N. W. 479.

J. A. Eggen, for the respondent.

Among other references upon the part of the respondent were the following: Browne, Stat. Frauds, §§ 406, 495; *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031; *Blakeslee v. Rossman,* 43 Wis. 116; De Colyar, Guar. 174; *Evenson v. Bates,* 58 Wis. 24, 15 N. W. 837; *Herbst v. Lowe,* 65 Wis. 316, 26 N. W. 751; *Gillmann v. Henry,* 53 Wis. 465, 10 N. W. 692; Bouvier, Law Dict. INSTRUMENT; *Shook v. Vanmater,* 22 Wis. 532; *Young v. Brown,* 53 Wis. 333, 10 N. W. 394; *Waldheim v. Miller,* 97 Wis. 300, 72 N. W. 869; *Van Doren v. Roepke,* 107 Wis. 535, 83 N. W. 754.

TIMLIN, J. The only question raised by the demurrer is whether, in the following contract, the consideration is sufficiently expressed to satisfy the requirements of the statute of frauds, sec. 2307, Stats. (1898):

"[Title of Cause.] Whereas, proceedings supplementary to execution are now pending in said action and the parties are desirous of effecting a settlement: It is hereby stipulated

that defendant pay to plaintiff, or his attorney, the sum of twenty-five dollars at or before delivery of this instrument and not less than five dollars on the first of each and every month, beginning with the first day of April, 1901, until, including the said twenty-five dollars, the sum of $433.20 shall have been fully paid, and that, if his financial condition warrant, he may be required to pay said sum in larger instalments, not exceeding ten dollars per month. In consideration thereof and in consideration of the promises hereinafter noted by the other parties hereto, plaintiff agrees to accept such payments when made as aforesaid, as a full satisfaction of the judgment in his favor and against defendant herein; he also agrees to release said judgment of record within three days from the delivery of this instrument and to pay all costs incurred subsequent to the entry of said judgment.

"W. E. SCOLLARD, Plaintiff.
"DAVID FRIEDMAN, Defendant.

"2. We, the undersigned, jointly and severally guarantee the full performance for said plaintiff by defendant at the times aforesaid, and further agree that no delay on the part of the defendant in making any such monthly payments, or by plaintiff in enforcing the same, is to be construed as in any way releasing either of us from any liability incurred by virtue of our signatures to this instrument.

"Dated April 8, 1901. JACOB BACH.
"JOSEPH CASPARI."

The fact that the signatures of the two principals appear appended to the first paragraph in the foregoing contract, and the signatures of the two sureties or guarantors separately to the second paragraph, would indicate an intention of the parties to make two separate contracts. But this inference is overborne by the language of the guaranty referring to "the times aforesaid." This means the times for payment specified in the preceding paragraph, and forms a connecting link between the separate paragraphs of this document. In the first paragraph the plaintiff *Scollard* undertakes to do certain things, after the delivery of the instrument, "in consideration of the promises hereinafter noted by the other parties hereto." There were no other promises thereinafter

noted than those of the sureties. There were no "other parties" to the contract except the sureties. It would do violence to the language of this instrument to hold that the words "the other parties hereto" meant Friedman alone. So that we have one instrument, in which instrument the consideration of the guaranty is expressed. *Blakeslee v. Rossman,* 43 Wis. 116; *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031; *Van Doren v. Roepke,* 107 Wis. 535, 83 N. W. 754; *Young v. Brown,* 53 Wis. 333, 10 N. W. 394; *Otis v. Haseltine,* 27 Cal. 80; *Highland v. Dresser,* 35 Minn. 345, 29 N. W. 55; Browne, Stat. Frauds, § 406.

By the Court.—The order of the circuit court is affirmed.

STATE EX REL. WELLER, Appellant, vs. HINKEL, City Clerk, Respondent.

May 12—June 5, 1908.

Taxation: "Property:" Exemptions: Stock in trust companies: Construction of statutes.

1. Corporate stock is "property" within the meaning of sec. 1034, Stats. (1898).
2. Under subd. 9, sec. 1038, Stats. (1898), exempting from taxation "stock in any corporation . . . which is required to pay taxes upon its property in the same manner as individuals," the "manner" of taxation referred to is taxation upon an *ad valorem* basis.
3. Prior to 1891 trust companies were required to pay taxes upon their property in the same manner as individuals, and stock therein was exempt. By ch. 263, Laws of 1891—sec. 1222*k*, Stats. (Supp. 1906; Laws of 1905, ch. 442)—they were required to pay annually a certain license fee and percentage of their net income "in lieu of all taxes" except taxes on their real estate. Under the new system the amounts payable were but a small proportion of those payable under the former law. *Held,* that the words "in lieu of all taxes," etc., indicate merely that the

general property of such companies is exempt from ordinary taxation; that they are not required to pay taxes in the same manner as individuals; and therefore that stock in such companies is taxable.

4. Rules for judicial construction of statutes are applicable only where there is uncertainty of sense.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Certiorari action involving the question of whether corporate stock in a trust company is taxable to the owners thereof.

Such proceedings were had that a writ of *certiorari* was duly issued from the circuit court for Milwaukee county to review the decision of the board of review of the city of Milwaukee assessing against the relator stock owned by him in two trust companies located in the city of Milwaukee, the relator being a resident of such city. Such proceedings were duly had on a motion to supersede the alternative writ that the court decided such stock was taxable and the writ was accordingly quashed and the action dismissed. From a judgment accordingly entered this appeal was taken.

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *E. S. Mack.*

For the respondent there was a brief by *John T. Kelly,* city attorney, and *Benjamin Poss,* special assistant city attorney, and oral argument by *Mr. Poss.*

MARSHALL, J. Corporate stock is property within the meaning of our taxing laws; therefore it must be, and is, conceded that stock in a trust company is taxable to the individual owners the same as property generally under sec. 1034, Stats. (1898), which provides that "taxes shall be levied upon all property in this state except such as is exempted therefrom," unless it is, by some other statute, exempt therefrom.

Subd. 9, sec. 1038, Stats. (1898), provides that "stock in any corporation in this state which is required to pay taxes

upon its property in the same manner as individuals" is exempt from taxation. If that includes such stock as that in question it is exempt, otherwise not.

The manner of taxing the property of trust companies is governed by sec. 1222*k*, Stats. (1898), as amended by ch. 442, Laws of 1905, which provides that

"Trust, annuity and guaranty corporations existing under ch. 86 shall, on or before the first day of March in each year, pay to the state treasurer, as an annual license fee for transacting their business, the sum of five hundred dollars; and in addition thereto shall pay three per centum of their net income during the calendar year preceding. The payment of such license and percentage shall be in lieu of all taxes for any purpose authorized by the laws of this state except taxes on such real estate as may be owned by such corporations."

Such manner of taxing the property of trust companies had its origin in ch. 263, Laws of 1891. Prior thereto they were required to pay taxes upon their property in the same manner as individuals, and consequently the corporate stock was exempt from taxation under the plain language of sec. 1038 above quoted.

Did this change in the manner of taxing the property of trust companies which, as seen, made no reference to the taxation of their corporate stock, by implication transfer such stock from the nontaxable to the taxable class of property?

It is contended that since by such change trust companies are still taxable upon their real estate in the same manner as individuals and the exaction on net earnings is declared to be "in lieu of all taxes" upon the property of the corporation except real estate, that thereby is shown a legislative purpose that such exaction shall be regarded as an equivalent for all purposes for the former tax and to leave the corporate stock exempt as before.

If the new way were reasonably calculated to produce an equivalent in public revenue for the old one there would be some reason for that view. But, manifestly, it is not. In

the very nature of things, under the new system, a trust company is required to directly contribute to the public revenues but a small proportion of the amount formerly rendered. The words "in lieu of all taxes," etc., are indicative merely that the general property of such companies is exempt from ordinary taxation. Such was the legislative purpose as shown by the amendment to sec. 1038, Stats. (1898), at subd. 31, providing that "all property of trust or annuity corporations organized under ch. 86, except real estate owned by them," shall be exempt from taxation. To adopt counsel's contention would result in holding that the legislature, without any reason which can be even imagined for the favor, singled out trust companies as a class of corporations to be substantially exempt from taxation upon their property without rendering any equivalent therefor indirectly by taxation upon the property in its representative form of corporate stock—a result which should be from its very absurdity avoided rather than adopted by judicial construction. If we consider that the legislature had in mind sec. 1034 and subd. 9, sec. 1038, Stats. (1898), and that relieving trust companies from the burden of direct taxation upon their property after the manner individuals are burdened upon theirs would transfer the stock of such corporations from the nontaxable to the taxable class, then the law of 1891 seems reasonable.

Further consideration of the case does not require the application of rules for judicial construction. Such rules are only applicable where there is uncertainty of sense. The latter must always precede necessity for invoking the former. So, though in the briefs of counsel the subject of strict construction and liberal construction, and that double taxation in an economic sense is to be avoided by rules of judicial construction unless the language of the law plainly provides for such taxation, are discussed at considerable length, we do not need to go over any of that ground, because the statutes in question are unambiguous. There is the plain provision

that the stock of a corporation is exempt from taxation only in case of its property being taxable in the same manner as the property of individuals. That, as suggested by counsel for respondent, divides corporations, generally speaking, into two classes; one where the property is taxable to the corporation in the same manner as the property of individuals, and the other where it is not. The property of individuals is taxable upon the *ad valorem* basis. That is the "manner of taxation," within the meaning of the statute. The property of trust companies, except in a very small and insignificant degree, is not taxable in such manner. It is not only nontaxable upon the *ad valorem* basis, but is practically exempt from taxation. So it seems that there is no escaping the conclusion that by the plain language of sec. 1034 and sec. 1038, Stats. (1898), the corporate stock of trust companies is taxable to the owners thereof as was held by the circuit court.

By the Court.—The judgment is affirmed.

KOZIK, Respondent, vs. CZAPIEWSKI, Appellant.

May 12—June 5, 1908.

Appeal: Review: Orders made after judgment: Bill of exceptions: Evidence: Leading questions: Discretion: Immaterial errors.

1. An appeal from a judgment does not bring up for review orders made after the judgment and after the term at which the verdict was rendered, denying leave to file exceptions to the charge and denying a motion to vacate the judgment and for a new trial.
2. Where, immediately after appellant's objection to a question had been sustained by the trial court, evidence of the same sort was admitted, but the bill of exceptions discloses no objection or ruling of the court thereon, no error is shown.
3. The extent to which leading questions may be put is very largely in the discretion of the court; and such discretion is

held not to have been exceeded in this case by allowing such questions to be asked of an illiterate witness imperfectly familiar with the English language.

4. Exclusion of a question asked on cross-examination merely by way of argumentative conclusion, from testimony previously given by the witness, as to her state of mind, with reference to which the jury could judge from such testimony, is *held* not a material error.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action for breach of promise of marriage, resulting in verdict for plaintiff of $100 compensatory, and $100 punitory, damages, from judgment in accordance with which the defendant appeals.

For the appellant the cause was submitted on the brief of *Carroll & Carroll.*

W. J. Kershaw, for the respondent.

DODGE, J. The appellant's brief contains no assignment of errors, and if any supposed error is not expressly considered he may ascribe the omission to that failure of the brief.

The appellant asserts errors in overruling a motion, made by him after judgment and after the term at which the verdict was rendered, for leave to file exceptions to the charge, and also a motion, made likewise after judgment, to vacate the latter and for new trial on the ground of insufficiency of evidence to support the verdict. We cannot consider whether any error was thus committed in either of these orders made after judgment in absence of appeals from such orders specifically. Sec. 3070, Stats. (1898); *Guetzkow v. Smith,* 105 Wis. 94, 96, 80 N. W. 1109; *Bank of Commerce v. Elliott,* 109 Wis. 648, 668, 85 N. W. 417.

Defendant complains of several rulings upon the admission of evidence:

(a) As to the first, the only ruling which appears by the bill of exceptions was in appellant's favor, sustaining his ob-

jection to a question. True, evidence of the same sort seems to have been admitted immediately thereafter, but the bill of exceptions discloses no objection or ruling of the court thereon, hence no error.

(b) Questions asked: "State whether or not your health has been good since the defendant failed to marry you," "Did this failure to marry you prey on your mind or trouble your mind?" were objected to as leading. The latter certainly has such vice, but the extent to which direct and leading questions may be put is very largely in the discretion of the court, and we cannot say that such discretion was exceeded in this instance, where the witness appears to have been illiterate and imperfectly familiar with English. *Bannen v. State,* 115 Wis. 317, 327, 91 N. W. 107, 965.

(c) The exclusion of question on cross-examination, "Then you did not care to marry him at the time you had the examination before the court commissioner?" This was merely by way of argumentative conclusion, from the testimony given before the commissioner, as to a mental state. What she in fact testified on that occasion had been shown, from which the jury could judge as to her state of mind. We cannot think that the exclusion of this argumentative question was error for which the judgment should be reversed. We find nothing else in the appellant's brief to justify discussion.

By the Court.—Judgment affirmed.

ELSNER, Respondent, vs. DORN, Respondent, and HAUCK and another, Appellants.

May 12—June 5, 1908.

Homestead: Exemption: Mortgages: Foreclosure: Order of sale.

1. **The right to have a homestead exempt from liability for debts is to be preferred in equity to the rights of creditors.**
2. **After defendant had established her homestead upon half of a lot owned by her, in a house built with money raised by a mortgage of the whole lot, contractors for the remodeling of a house on the other half lot obtained a mechanic's lien upon such other half and bought it in at the sale on foreclosure of their lien. *Held*, that upon foreclosure of the mortgage on the whole lot the half so acquired by the contractors, which was not the homestead, was properly ordered to be sold first.**

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The defendant *Augusta Dorn* was the owner of a lot in the city of Milwaukee which extended from Twenty-fourth street to West Twenty-fourth street in the block between Hadley and Center streets. For many years she had occupied it as her homestead, living in an old house which stood on the half of the premises fronting Twenty-fourth street. She entered into a contract with the defendants *Hauck* and *Bartelt* for the erection of a house on the other half of the premises, which fronts on West Twenty-fourth street, with the intention of occupying the same as her homestead. This house was completed, accepted, and occupied, and paid for with money raised on a mortgage executed by *Augusta Dorn* on the whole of the premises. Thereafter she entered into a contract with *Hauck* and *Bartelt* to remodel and rebuild the old house fronting on Twenty-fourth street. While the remodeling was being done trouble arose between the parties to the contract and *Hauck* and *Bartelt* filed a mechanic's lien against the half of the premises fronting on Twenty-fourth street. They obtained judgment against *Augusta Dorn,* and

her interest in the half of the premises fronting on Twenty-fourth street was sold to them for less than the amount of the judgment, and a deficiency judgment was ordered in their favor. They thereafter completed and remodeled the old house without regard to the plans and specifications according to which the contract for remodeling and constructing the building had been made.

The instant action was commenced to foreclose the mortgage given by *Augusta Dorn* on the whole premises. She answered, demanding that the part of the premises fronting on West Twenty-fourth street which she occupied and claimed as her homestead should be sold separately and last. The defendants *Hauck* and *Bartelt* asked that this part of these premises should first be sold to satisfy the mortgage. The court found that the house and a part of the premises fronting on West Twenty-fourth street was the homestead of the mortgagor, and ordered that the other half of the premises should be first sold to satisfy the mortgage. This is an appeal by the defendants *Hauck* and *Bartelt* from such judgment.

For the appellants the cause was submitted on the brief of *J. F. Griffin.*

Adolph Huebschmann, for the respondent *Dorn.*

SIEBECKER, J. Appellants assert in effect that it is inequitable under the circumstances to sell first for satisfaction of the mortgage debt the portion of the premises not included in the mortgagor's homestead. It is evident that when appellants' lien arose the mortgagor, *Mrs. Dorn,* had established her homestead right to the premises she now occupies and that she was entitled to all the benefits that inhere in a homestead right. It has been held by this court that this right is superior in equity to that of creditors.

"The right of the owner to have his homestead exempt from 'liability in any form' (R. S. sec. 2983) for his debts is superior to the equity of a creditor to have it applied to the

payment of his debt. However it may have been formerly and in the absence of a statute declaring his right, it is now the settled policy of the law to prefer the homestead right as against the rights of creditors." *Clancey v. Alme,* 98 Wis. 229, 73 N. W. 1014.

Under the facts of this case the court properly adjudged that the portion of the mortgaged premises constituting the mortgagor's homestead should not be sold or offered for sale until the other lands embraced in the judgment have been so offered and sold.

By the Court.—Judgment affirmed.

VOHLAND, Appellant, vs. GELHAAR, Respondent.
SAME, Respondent, vs. SAME, Appellant.

May 13—June 5, 1908.

Contracts: Validity: Statute of frauds: Sales: Agreement to take back at advanced price: Entire contract: Part performance.

1. A finding by the jury that defendant agreed to repurchase mining stock sold by him to plaintiff within one year from the date of the sale, is *held* to be sustained by the evidence; and sec. 2307, Stats. (1898), is therefore inapplicable.
2. Where, as a condition of the sale of mining stock, the vendor agreed that he would, at the vendee's request, repurchase it within a year at an advanced price, there was but one entire contract, and delivery of the stock and payment therefor by the vendee constituted such part performance as satisfied the statute of frauds—sec. 2308, Stats. (1898),—and entitled the vendee, upon due demand, to recover the advanced price.

APPEALS from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed on plaintiff's appeal.*

This case comes before this court on appeals by both the plaintiff and defendant from a judgment of the circuit court

for Milwaukee county in favor of the plaintiff and against the defendant for the sum of $300, interest and costs, amounting in all to $403.52. The plaintiff brought action to enforce an agreement between the parties, by which the defendant promised to repurchase from the plaintiff 600 shares of mining stock for $1 per share, which at the time of making the agreement was sold by the defendant to the plaintiff for fifty cents per share. The condition upon which the defendant was to repurchase the stock was that the plaintiff should tender a return thereof within one year from the date of sale, which took place November 15, 1902. The plaintiff tendered back the stock within a year and demanded $600 therefor, in accordance with the agreement, but the defendant refused to repurchase the same and pay said sum. The issue of fact as to whether such agreement was made was decided in a special verdict by the jury in favor of the plaintiff. Upon this verdict the court rendered a judgment for $300 instead of for $600, in accordance with the agreement. The plaintiff contends that the court should have rendered judgment for $600, with interest and costs, while defendant insists that the special verdict was contrary to the evidence and that the contract to repurchase was void because within the statute of frauds (secs. 2307, 2308, Stats. 1898).

For the plaintiff there was a brief by *Fred C. Lorenz,* and oral argument by *Mark A. Cline.*

John F. Thieman, for the defendant.

BASHFORD, J. The defendant contends that the finding of the jury that he agreed to repurchase the stock sold the plaintiff within one year from the date of sale is not supported by the evidence, and consequently that such an agreement, if made, no part thereof having been reduced to writing, was void under sec. 2307, Stats. (1898). The plaintiff testified that the defendant stated to her repeatedly, when trying to sell her the stock: "If you buy these shares, if you

don't want them in the time of a year, I take them back for a dollar a share;" and that this was the consideration for the purchase of the same by her at fifty cents a share. Her son, who was present, testified that the defendant stated that the money was needed for a smelter and that the mine would pay dividends before Christmas, and "made plaintiff the proposition, if she would take the shares, that he would agree to take them back within a year at a dollar a share." Plaintiff's husband, who acted as her agent in part of the negotiation, stated that the defendant made similar representations to him. Another witness, who was in the employ of the plaintiff at the time the purchase was made, fully corroborated her testimony that if she did not want the stock defendant would take it back at $1 a share at the "time of a year." This witness, as well as the plaintiff, did not speak English with accuracy, and the idea intended to be conveyed by the words quoted, as understood by the jury, was that the defendant would take back the stock at the end of the year or within the year. This proof was sufficient to warrant the finding of the jury as to the terms of the agreement and consequently sec. 2307 has no application.

A more difficult question arises on the application of sec. 2308, Stats. (1898). The third subdivision of that section renders the agreement to repurchase the stock void, if it be treated as an independent contract, unless the plaintiff at the time it was made paid some part of the consideration therefor. The plaintiff maintains that the statute does not apply because the agreement to buy the stock by the plaintiff and to repurchase the same by the defendant at her request within the year was one entire contract, which had been fully performed by the delivery of the shares and the payment of the original purchase price. The defendant contends that the sale of the stock to the plaintiff and the agreement to repurchase were separate and independent contracts and that the latter is avoided by the statute. The trial court apparently

adopted the view that the transaction established an entire contract, but held that the agreement to repurchase embodied two elements, the first giving the plaintiff the right to rescind the sale and to demand a return of the purchase money, and the second a promise on the part of the defendant to pay the plaintiff an additional fifty cents on each share upon such rescission; that the first element was not affected by the statute of frauds, while the second element was avoided by its provisions. Upon this theory plaintiff was awarded judgment for the purchase money and interest. This conclusion is assailed by counsel for both parties, and we are unable to see how it can be sustained, either upon reason or authority.

If the agreement to sell and the promise to repurchase are parts of the same transaction there is but one entire contract, for which the consideration was paid and under which the property was delivered, and consequently the statute of frauds has no application. The agreement to take back the stock expressly provided for the payment of $1 per share. There was no stipulation for rescission upon any other terms. It is difficult to see how this part of the contract can be treated as divisible and a repurchase compelled upon repayment of the purchase price. This would be to make a new contract for the parties, which neither party has ever assented to and which both parties repudiate. If there is a right of rescission on the part of the plaintiff it must be enforced in accordance with the terms of the contract as established by the evidence.

The jury found that the defendant agreed, as a condition to the sale of the stock to the plaintiff, that he would purchase back the stock at $1 per share, and that the repurchase would be made within one year from the date of sale, and that the plaintiff offered back the stock to the defendant at $1 per share within the year. The evidence is sufficient to support all these findings, and we conclude, therefore, that this was an entire contract for the sale of the stock, the consideration

for which was fully paid by the plaintiff to the defendant, he promising at the time to take the same back within a year if the plaintiff so desired and to pay her therefor $1 per share. The promise to take back the stock by the plaintiff is referred to in the complaint as an agreement to repurchase, as it is also in the second answer of the special verdict. The terms were obviously so used as synonymous, as all the testimony on behalf of the plaintiff was that the defendant promised to take back the shares at the increased price within or at the time stated. The plaintiff executed the contract on her part, tendered back the stock before the expiration of the year, and demanded the price agreed to be paid therefor. The agreement to purchase the stock by the plaintiff upon the consideration stated, and the promise to take back the stock at an advanced price, being parts of an original and entire contract, constituted a conditional sale, and the delivery of the shares and the payment of the purchase price satisfied the statute of frauds, and the plaintiff is entitled to recover the amount agreed to be paid by the defendant upon a return of the stock.

The legal principle underlying the foregoing proposition is fully supported by the adjudicated cases: *Williams v. Burgess,* 10 A. & E. 499; *Lumsden v. Davies,* 11 Ont. App. 585; *White v. Knapp,* 47 Barb. 549; *Wooster v. Sage,* 67 N. Y. 67; *Fitzpatrick v. Woodruff,* 96 N. Y. 561; *Hilliard v. Weeks,* 173 Mass. 304, 53 N. E. 818; *Henderson v. Touchstone,* 22 Ga. 1; *Fay v. Wheeler,* 44 Vt. 292.

The agreement in all the cases cited, except the two first, was that the seller would take back or repurchase the thing sold at the original purchase price, in some instances with interest; but a stipulation for an advanced price would not affect the principle involved, but might be considered as proof tending to establish an independent contract void under the statute. An application of the doctrine is well illustrated in the English cases cited. In *Williams v. Burgess, supra,*

plaintiff sold a mare to the defendant for £20 with the understanding that, if she should prove to be in foal, he might have her back on paying £12. The mare was delivered to the defendant, and afterwards, when she proved to be in foal, the plaintiff tendered £12, but the defendant refused to return her and set up the statute of frauds as a bar to recovery on the agreement. The court held that this stipulation was not an independent agreement, but was part of the original contract, which was a qualified sale, which was taken out of the statute by the acceptance of the thing sold. *Lumsden v. Davies, supra,* follows this decision, and applies the rule to a sale of tea by the defendant to the plaintiff, upon a verbal agreement that he would take back, at an advance of ten cents a pound, such part thereof as the latter should have in stock at a certain date. The court held that there was but one entire conditional contract, not one contract to sell the tea to the plaintiff and another to buy it back; and therefore the delivery of the tea by the defendant satisfied the statute of frauds and plaintiff was entitled to recover for the defendant's refusal to take back the unsold tea. In *Wooster v. Sage, supra,* plaintiff purchased of defendant certain railroad bonds, with the option of returning the same if he became sick of them, in which case defendant agreed to repay the purchase money. The offer to return the bonds was not made until three years after the sale. It was held that the agreement to take back the stock was not void under the statute, and that the plaintiff was entitled to recover the purchase money with interest. In *Fitzpatrick v. Woodruff, supra,* defendant sold plaintiff certain bonds, and promised that if the latter became dissatisfied he would, on thirty days' notice, take them back and return the money paid for them with interest. In an action to recover the amount it was held that the agreement was not within the statute of frauds and the plaintiff was entitled to recover. In *Fay v. Wheeler, supra,* defendant sold plaintiff certain shares of stock and agreed to take the

same back and repay the plaintiff the purchase price on request. It was held that the contract for repayment was not within the operation of the statute of frauds though not in writing. The following language in the opinion is applicable to the facts here presented:

"The promise and undertaking sought to be enforced was a part of the plaintiff's purchase by the original contract, and so material a part that the purchase would not have been made without it. The original contract was taken from the operation of the statute by a part performance by both parties, by the delivery of the stock by the defendant, and by the payment of the money by the plaintiff."

Browne on Statute of Frauds (sec. 293) says: "A stipulation that the subject of the sale may be returned in a certain event is not to be regarded as a contract for resale, so as to be affected by the statute," and he there makes reference to *Williams v. Burgess,* above referred to. He says in sec. 293*a:*

"But it may be necessary to distinguish between such a case as this, where the stipulation to return is annexed to the original sale by way of condition, and the case of a stipulation to resell at a future time for the same or a different price, although made contemporaneously with the original sale."

He cites no decision which recognizes the distinction, where the stipulation was made by the parties to the original contract, and defendant's counsel has referred to none, although insisting that the stipulation in the present contract is for resale and not for rescission. The intention of the parties to a contract must be determined by the language employed as generally understood and not by a technical definition of words in common use in ordinary transactions. The use of the word "repurchase," in defining the stipulation, sufficiently expresses the understanding of the parties, as testified to by the plaintiff, that she bought the stock relying upon the promise of the defendant that he would take it back

within a year, if she so desired, at $1 per share. The general rule stated by Mr. Browne is here applicable, and the distinction which he seeks to make has no bearing in this case.

The plaintiff, upon the evidence in this record and upon the authorities cited, is entitled to recover the price stipulated upon a return of the stock as part of the original contract, with interest from the date of defendant's refusal to fulfil his promise in that regard.

By the Court.—Judgment reversed on plaintiff's appeal, with directions to enter judgment in accordance with this opinion; the defendant to take nothing on his appeal.

ELWELL, Respondent, vs. ADDER MACHINE COMPANY, Appellant.

May 13—June 5, 1908.

Foreign corporations: Licensing: Interstate commerce: Contract of agency for intrastate business: Fraud: Nonperformance: Remedies.

1. Sec. 1770*b*, Stats. (1898), requiring foreign corporations to obtain a license before transacting business or acquiring, holding, or disposing of property in this state, does not apply to such business as constitutes interstate commerce or to such property as is acquired, held, or disposed of in this state in carrying on interstate commerce; and from the provision declaring that contracts by an unlicensed foreign corporation shall be void on its behalf but enforceable against it there must be excepted such contracts as relate to interstate commerce.
2. A complaint alleges that defendant, an unlicensed foreign corporation engaged in the business of selling adding machines, fraudulently induced plaintiff to enter into a contract to act as its selling agent for such machines in this state; that the fraud consisted in representing, by its conduct in making such contract, that it was a licensed corporation, and in concealing the fact that it was not licensed to do business in this state; that

in execution of the contract, before discovering the facts, plaintiff had incurred certain expenses; and that upon such discovery he ceased to transact the business of the agency. *Held*, that if the contract set forth be construed to relate to interstate commerce and to be capable of being carried out by acts constituting such commerce, plaintiff shows himself in default and has no cause of action; while if the contract relates to intrastate commerce defendant would be unable to perform on its part until it should obtain a license to do business in this state, and for failure of performance by defendant the plaintiff has a right of action on the contract, the existence of which right excludes any right of action for deceit or upon any *quasi*-contract liability.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

The appeal is from an order overruling a demurrer to the complaint. The complaint averred that the respondent was at all times therein mentioned a citizen and resident of Wisconsin and that the appellant was a foreign corporation organized and existing under the laws of the state of Pennsylvania and engaged in the business of selling and repairing a machine called the Wales adding machine. January 22, 1907, in the state of Wisconsin, the parties entered into a contract in writing which is set forth in full in the complaint. This contract recites that the appellant is a corporation of Pennsylvania, and the appellant therein expressly appoints the respondent its selling agent for the sale of said machine for three years, with the privilege on the part of the respondent of a renewal for two years if his handling of the business is satisfactory to the appellant. The respondent is designated in every paragraph of the contract as selling agent. Respondent takes over and assumes a lease of certain premises in Milwaukee and also indebtedness for office furniture and equipment, has the exclusive right to sell in the state of Wisconsin and northern Michigan, and agrees to devote his time and best endeavors to sell the said Wales adding machine throughout said territory. All machines received by

the selling agent or sold are to remain the property of the appellant until fully paid for. The machines are to be billed by the appellant to its customers in the name of the appellant, and payments therefor to be made by check or draft direct to the order of the appellant. Respondent should adopt such forms and terms in connection with the sales as might be required by the appellant, no machine to be sold except in the described territory without written permission from the home office of the appellant or from that agent of the appellant in whose territory the machine is to be placed. In that case the respondent should receive only part commission. The respondent was not allowed to sell the machines for less than the full list or invoice price, except by written permission of the appellant, and the respondent was to furnish a bond to the appellant in the sum of $5,000 if required. The respondent was required to bear all expenses in connection with the sale of said machines, except those provided by appellant in its general rules or policy governing its agency contracts. The compensation of the respondent was a commission of thirty-five per cent. of the selling price of the machine, which was to be in full and become due only after the appellant had received full payment for the machine. No machines could be left by the respondent on trial with any one person for a period exceeding sixty days without written permission from the appellant. No second-hand machine or other property could be accepted in exchange or as part payment without written authority from the appellant. Supplies used in the operation of the adding machine, including paper and ribbons, were required to be paid for by the respondent in cash, but at the close of the term of the selling agency or upon cancellation of the contract the appellant agreed to accept all supplies of the respondent which were then on hand and in good condition and repay the respondent the amount paid to the appellant therefor.

It was averred that the appellant at a time prior to the exe-

cution of said contract was, ever since has been, and now is subject to the conditions and provisions of sec. 1770*b*, Stats. (1898), and acts amendatory thereof, and sec. 1770*d*, Stats. (Supp. 1906; Laws of 1901, ch. 399, sec. 3), and at the time of the execution of said contract and for a long time prior thereto the appellant was, ever since has been, and now is doing business in the state of Wisconsin without in any way complying with the requirements of sec. 1770*b* and acts amendatory thereof, and was, is, and has been engaged unlawfully in carrying on business in the state of Wisconsin, in violation of said sec. 1770*b* and acts amendatory thereof, and without the license mentioned in said statutes; that the appellant was and is engaged in displaying, demonstrating, repairing, and selling said machines in said state of Wisconsin contrary to said statutes; that at the time said contract was entered into, by the terms thereof and by the construction thereafter placed on said contract by the parties thereto, it was contemplated and intended by the appellant that the respondent should assume the lease of the premises formerly occupied by appellant and should maintain an office at such premises within the state of Wisconsin for the transaction of said company's business, and should display, advertise, and demonstrate said machines by leaving them on trial with persons, firms, and corporations within the state of Wisconsin, and should sell said machine by contracts of sale entered into and fully consummated within said state; and that it was further intended by said appellant that this should be done in violation of said statutes.

After other averments it was pleaded

"that by the making of said contract and by the manner in which said defendant had theretofore conducted its business within said state of Wisconsin, and by the course it pursued in conducting its business in said state thereafter, said defendant fraudulently, falsely, and deceitfully represented to this plaintiff that it had complied with the foreign corporation laws of the said state of Wisconsin hereinbefore men-

tioned and that it was authorized to transact business within said state; and said defendant also falsely, fraudulently, and deceitfully concealed from said plaintiff the fact that it had not complied with said foreign corporation laws and was not authorized to transact business within said state of Wisconsin; that said representations were false and were made by said defendant with knowledge of their falsity and with intent on the part of said defendant, by means thereof and by means of the fraudulent concealment of facts hereinbefore mentioned, to deceive said plaintiff and cause him to act thereon and to execute the contract hereinbefore mentioned; that at the time of the execution of said contract as aforesaid plaintiff had no knowledge of the fact that said defendant was not authorized to do business within said state of Wisconsin, but said plaintiff, in good faith, relied on the representations of said defendant above mentioned and acted thereon and was deceived thereby, and on the faith of said representations and by reason of the fraudulent concealment above mentioned executed said contract and entered upon the performance of the conditions of said contract on his part to be performed."

It was then averred that the respondent, pursuant to said contract and in good faith, incurred expenses to the amount of $1,412.10 in renting an office, advertising and displaying appellant's machines and placing them on trial, and in traveling expenses, etc., all in the hope and expectation of being reimbursed therefor by commissions on sales; that the respondent was unable to make sales under said contract, for the reason that he would thereby be aiding the appellant to evade and violate the foreign corporation laws of the state of Wisconsin; that this expenditure was made before the respondent discovered that the appellant had not complied with said foreign corporation laws; and that as soon as the respondent acquired that knowledge he ceased to transact the business of the agency, to his damage in the sum aforesaid.

For the appellant there were briefs by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

Among other references upon the part of the appellant were the following: Sec. 1770*b*, Stats. (1898); *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888; *Holder v. Aultman,* 169 U. S. 81, 18 Sup. Ct. 269; *Laun v. Pac. Mut. L. Ins. Co.* 131 Wis. 555, 111 N. W. 660.

For the respondent there was a brief by *Cary, Upham & Black,* attorneys, and *H. M. Carpenter,* of counsel, and oral argument by *Mr. Carpenter.*

Among other references upon the part of the respondent were the following: *U. S. v. Robbins,* 157 Fed. 999; *Corbett v. Physicians' Cas. Asso.* 135 Wis. 505, 115 N. W. 365; *Kiewert v. Rindskopf,* 46 Wis. 481, 1 N. W. 163; *Melchoir v. McCarty,* 31 Wis. 252; *Wells v. McGeoch,* 71 Wis. 196, 35 N. W. 769; *Miller v. C. & N. W. R. Co.* 133 Wis. 183, 113 N. W. 384; *Cella C. Co. v. Bohlinger,* 147 Fed. 419; *U. S. v. Reese,* 92 U. S. 214; *Trade-Mark Cases,* 100 U. S. 82.

TIMLIN, J. The complaint concedes that the respondent entered into the contract in question and that he failed to perform on his part and withdrew from the contract. The ordinary legal effect of this would be to give rise to a cause of action against him rather than in his favor. But he points us to sec. 1770*b*, Stats. (1898), as amended by sec. 27, ch. 351, Laws of 1899, sec. 1, ch. 399, Laws of 1901, sec. 1, ch. 434, Laws of 1901, and ch. 506, Laws of 1905, and on these bases his claim that an actionable wrong was first committed against him by the appellant and his withdrawal from the contract in question justified.

By ch. 506, Laws of 1905, foreign corporations like the appellant, as a condition precedent to transacting business or acquiring, holding, or disposing of property in this state, must file in the office of the secretary of state a copy of the charter, etc., of the corporation, also certain reports, and pay a fee and appoint the secretary of state as an attorney for such corporation upon whom service of process may be made. License to transact business in this state is by the secretary of

state then issued to all foreign corporations which comply with these requirements. Sec. 1770*c*, Stats. (Supp. 1906; Laws of 1901, ch. 399, sec. 2).

"Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them." Ch. 506, Laws of 1905. "The failure to comply with any of the provisions of this section shall, for such violation, subject the corporation or any agent, officer or person *acting for it* in this state, to a penalty of five hundred dollars." Id. "Such penalty shall not attach where a specific penalty is herein provided." Id.

There must be read into the foregoing statutes, where they forbid the transaction of business in this state and the acquisition, holding, and disposal of property in this state, an exception of such business as constitutes interstate commerce and an exception of such property as is acquired, held, or disposed of in this state in carrying on interstate commerce. Also, where every contract is declared to be void, we must except from that provision such contracts as relate to interstate commerce. *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829; *Catlin & P. Co. v. Schuppert,* 130 Wis. 642, 110 N. W. 818; *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888.

Based upon this condition of the law the respondent urges that he has a right of action against the appellant "for damages sustained by him by reason of appellant's having fraudulently induced him to innocently aid it in carrying on an unlawful business within the state of Wisconsin, the action being founded on the deceit of appellant in inducing respondent to enter into a three-year agency contract by which he was to pay his own expenses when appellant was an unlicensed corporation and had no right to do business within the state." It is contended that appellant's fraud consisted in represent-

ing by its conduct in executing the contract in question that it was a licensed corporation and in concealing from respondent the fact that appellant had not obtained license to do business in this state. *West London Com. Bank v. Kitson,* L. R. 13 Q. B. Div. 360; *Lobdell v. Baker,* 1 Met. 193; and *Rosenbaum v. U. S. C. S. Co.* 64 N. J. Law, 34, 44 Atl. 966 (*vide* 60 N. J. Law, 294, 37 Atl. 595; 61 N. J. Law, 543, 40 Atl. 591; 65 N. J. Law, 255, 48 Atl. 237), are cited and relied upon by the respondent. But it must be noticed that the mere execution of the contract, if the contract related to and could be carried out by interstate commerce transactions, was not an act forbidden by law. We have here a peculiar legal relation. The appellant is not absolutely prohibited from contracting within this state, but is prohibited from contracting except with reference to a particular subject matter. That the contract set forth in the complaint could relate to interstate commerce and might be carried out by acts constituting such commerce is, we think, apparent from its provisions. *Loverin & B. Co. v. Travis, supra.* Indeed, the draftsman of the complaint seems to have felt the force of this, for he industriously averred that the appellant was and is transacting business in the state of Wisconsin in violation of the statute in question. On the other hand, if the contract did not relate to matters of interstate commerce and the execution of the contract itself be considered a transaction of business by the appellant in this state, the respondent had by the express terms of the statute acquired by such contract an enforceable contract right against the appellant, which was all he sought or expected in any event. There cannot be much question but that the legislature has the power to give this right of action to one party to a contract by express statute, as this court has held it did by legal implication in *Laun v. Pac. Mut. L. Ins. Co.* 131 Wis. 555, 111 N. W. 660. The statute is explicit, to the effect that the contract shall be enforceable against the unlicensed corporation, and to this ex-

tent indicates a legislative policy to treat the foreign corporation, so far as the making of the preliminary contract is concerned, as the offending party by prohibiting it from taking advantage of its own default. The failure to comply with any of the requirements of the act under consideration shall subject the corporation, or any agent, officer, or other person acting for it in the state, to a penalty of $500. No liability under this provision can be predicated upon the mere omission to obtain a license. The acts prohibited are transacting business within the state, or acquiring or disposing of property within the state, without compliance with the statutory conditions precedent. In making and signing the contract in question respondent was not acting for the corporation, but for himself. By this act he violated no law, incurred no penalty. It may well be that the respondent would subject himself to this penalty should he attempt to transact business for the unlicensed corporation not interstate commerce, or to acquire or dispose of property for the corporation in this state and not in the transaction of interstate commerce, and he had the right to refuse so to do. But such refusal did not leave him without remedy upon the contract. Such refusal would leave him in the position of any contracting party who by reason of the default of the other party to the contract, or the nonperformance by the other party, has a right to refuse to proceed further and begin an action *ex contractu*. This merely means that the corporation was unable, until it obtained a license, to perform on its part, and for this failure of performance the respondent had a right of action on the contract in question under the statute. Whether to perfect this right of action he should aver a demand upon the corporation and its failure, or the refusal so to do, we need not here determine. It is sufficient in the case at bar to determine, as we do, that the existence of this right *ex contractu* excludes any right of action for deceit or upon any *quasi*-contract liability. If we assume that the contract related to

interstate commerce the respondent has shown himself in default; while if the contract, upon a true construction thereof, considering the language employed and the surrounding circumstances, relates to intrastate commerce, the complaint shows the appellant in default thereon with a right of action *ex contractu* existing in favor of the respondent.

It follows that the demurrer to the complaint was improperly overruled, and that the order of the circuit court should be reversed with directions to enter an order sustaining the demurrer.

By the Court.—It is so ordered.

WILL OF CARNEY: CARNEY, Appellant, vs. CARNEY, Respondent.

May 13—June 5, 1908.

Wills: Undue influence: Evidence.

A finding by the trial court that a will was the product of undue influence on the part of the sole devisee is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *A. W. Fairchild.*

Joseph G. Donnelly, for the respondent.

WINSLOW, C. J. This is a will contest. The testatrix, Mary E. Carney, a widow somewhat more than seventy years of age, died at her residence in Milwaukee, December 23, 1904, leaving four adult sons surviving, viz., Edward, *George, Frank,* and John. On the 16th day of the previous August she had executed a will leaving all of her property, consisting almost entirely of her homestead in Milwaukee, to

her son *Frank*. This will was duly presented for probate, and objections were filed thereto by *George* on the ground that the testatrix was not of sound mind and that the will was the result of undue influence. The will was admitted to probate by the county court, but on appeal to the circuit court that court found in substance that while the deceased was not incompetent to make a will, still that she was so weak-minded and infirm as to be easily susceptible to undue influence, and that her son *Frank* occupied a position of trust and confidence with his mother and did in fact avail himself of his position and dominated her mind and unduly influenced her to execute the will in question in his favor. Upon these findings of fact the court reversed the order of the county court, and the proponent appeals.

The appeal presents simply the question whether the finding that the will was the product of undue influence on the part of *Frank* is supported by the evidence. Much of the evidence on this question was circumstantial. We have carefully examined it and find ourselves unable to say that the finding is against the clear preponderance thereof. This result necessitates affirmance under familiar and well-settled rules. No attempt to state the details of the evidence would be useful.

By the Court.—Judgment affirmed; contestant's statutory costs in this court to be taxed and paid out of the estate.

LEHR, Receiver, and others, Appellants, vs. MURPHY and others, Respondents.

May 13—June 5, 1908.

Corporations: Creditors' action: Jurisdiction: Foreign corporations: Receivers: Parties: Statutes: Nature of action: Pleading.

1. A creditor's action may be maintained in the courts of this state against a foreign corporation to conserve its property within the jurisdiction of such court for the payment of claims of

creditors properly invoking such jurisdiction, as in case of a domestic corporation.

2. It is not essential to the commencement of a creditor's action against a corporation that there be a receiver appointed.

3. In case of the commencement of a creditor's action to conserve the property of a corporation for the benefit of creditors, if a creditor plaintiff is so circumstanced as to be competent to so invoke the court's jurisdiction other creditors not so circumstanced may be joined, and if a receiver appointed before the commencement of the action be also joined, whether the appointment be regular or not is immaterial, it being sufficient if there be one creditor plaintiff competent as aforesaid.

4. The jurisdiction of the court to entertain a mere creditor's action against a corporation does not depend upon sec. 3216, Stats. (1898), and its associate sections. They are supplementary to, not in place of, the common law in regard to such matters.

5. A mere creditor's action such as is above mentioned is not an action to wind up a corporation nor one to regulate its internal affairs.

6. A complaint by a party competent to commence a creditor's action and containing a statement of the facts essential to such an action is good therefor as against a general demurrer, though parties be joined not necessary to such action and the complaint contains a statement of facts proper for a winding-up action and to vindicate rights not necessary to be determined in a creditor's action.

7. Under the rule that some facts are pleadable according to their legal effect, it is proper in a complaint for a creditor's action, as regards the proper entry of the judgment at law on the moving creditor's claim and exhaustion of legal remedies for its collection, to allege, generally, that the judgment was duly rendered in a court having jurisdiction of the matter, specifying the same, and that execution was duly issued to enforce such judgment and that such execution was returned unsatisfied. In such case, under the liberal rules of pleading, the detailed facts sufficiently appear by reasonable inference.

8. Circuit Court Rule XXVII, sec. 1, requiring in a creditor's action the pleading to state the amount actually and equitably due upon his judgment at law, is sufficiently complied with by the usual allegations that the action was not brought by collusion, etc.; that execution was duly issued to enforce the judgment and that the same was returned wholly unsatisfied.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

The appeal is from an order sustaining a demurrer to the complaint, which alleged the following facts:

Defendant *Standard Lead & Zinc Smelting & Mining Company* is a corporation organized under the laws of the territory of Arizona February 24, 1905, with an authorized capital of one million shares of the par value of $1 each. Its designated office and principal place of business is and always has been in the city of Milwaukee, Wisconsin. Since June 5, 1905, defendants *Murphy, Zien, McKinney, Davidor, Evans,* and *Van Wyck,* all being residents of said city, except *Zien,* who resides at Duluth, Minnesota, and *McKinney,* who resides at Pittsburg, Pennsylvania, have been its directors. April 23, 1906, plaintiff *Field,* in a justice's court of La Fayette county, Wisconsin, procured a judgment against said corporation for $134.82, upon which execution was duly issued out of the circuit court for said county and returned *wholly* unsatisfied. Thereafter plaintiff *Lehr* was duly appointed by the county court of said county receiver of the property of said corporation, and he duly qualified and by due proceedings was authorized to bring this action. Plaintiffs *Rosenberg* and *Meske* are stockholders of the corporation, and as well as plaintiff *Field* are creditors thereof, and have been duly joined as plaintiffs in their own behalf and in behalf of all other creditors of the corporation who may wish to participate in the action.

All the business of the corporation has been done in the state of Wisconsin and all of its effects are located therein. This action is brought for the sole purpose of compelling the defendant's directors to pay such sums as they ought to pay and for the satisfaction of the debts of the corporation. The proceedings of such directors hereafter mentioned were in violation of the law of the territory of Arizona and the law of the state of Wisconsin. The corporation is possessed of effects in the state of Wisconsin held in secret trust for it by some of the defendants, the evidence of which is under their

control and in respect to which discovery is sought. The corporation is insolvent, owing debts far in excess of its assets. The individual defendants by collusion permitted defendant *Davidor,* or a corporation controlled by him, to acquire from the defendant corporation three quarters of its capital stock in exchange for a mining lease and property obtained by him and in which he had not made any investment, the corporation assuming all obligations in that regard and so taking the property at such a fictitious value as really to not realize any consideration for the stock. The proceedings in respect to that matter were thereafter ratified at a meeting of the directors, all being present except *McKinney.* All except him personally knew of the entire transaction.

Said directors fraudulently entered into an arrangement with *Davidor* and his corporation to allow the latter as sole agent for the sale of the corporate stock a commission of fifty per cent. of all sums received for said stock, and they fraudulently entered into a further agreement whereby one half of such stock was divided into seven portions and one such portion was turned over to each director for $100, except *Evans,* who paid $500, and *McKinney,* who paid $5,000, and the seventh portion was divided equally between *Davidor* and *Zien,* each paying $50. Pursuant to said fraudulent arrangement as to the division of stock and allowance of commission, one half of the $6,000 received by the corporation aforesaid was paid to *Davidor's* corporation. The scheme aforesaid, among other things, was entered into to make it appear to prospective purchasers of stock at second hand that the defendant corporation had received $500,000 for one half of its stock. As a part of the arrangement to allow fifty per cent. commission for the sale of stock, *Davidor,* or his corporation, returned one third of the stock received for the mining lease and property aforesaid and the same formed a part of the stock distributed as aforesaid.

The individual defendants owned the stock acquired by

them as aforesaid at the time the indebtedness to plaintiff *Field* was incurred, and they still own the same, never having paid therefor except as indicated. The contract allowing fifty per cent. commission for selling the corporate stock was fraudulently kept secret from general stockholders. The defendant's directors negligently and fraudulently squandered the property of their corporation, so crippling it as to cause other losses, aggregating in all $100,000, and they fraudulently paid two dividends amounting to $1,816.46, there being no net profits out of which to pay the same.

The prayer for relief is broad enough for an ordinary creditor's action and also for a general winding-up suit as in case of the final and full settlement of the affairs of an insolvent corporation.

The demurrer was upon the following grounds:

(1) Want of jurisdiction of the person of the defendant or of the subject of the action.

(2) Want of legal capacity to sue.

(3) Improper joinder of causes of action.

(4) Defect of parties plaintiff and defendant and improper joinder of the corporation as defendant.

(5) Want of facts sufficient to constitute a cause of action.

For the appellants there was a brief by *C. H. Hamilton* and *Joseph B. Doe,* attorneys, and *J. B. Simpson,* of counsel, and oral argument by *Mr. Hamilton.*

For the respondents *Murphy* and *Zien* there was a brief by *Wegner, Blatchley & Gilbertson;* for the respondent *McKinney* a brief by *Boden & Beuscher;* and the cause was argued orally by *Andrew Gilbertson* and *F. X. Boden.*

MARSHALL, J. Only the first and fifth grounds of demurrer are argued in the briefs of counsel for respondents. Therefore the other grounds will be regarded as abandoned, though we will say, in passing, that viewing the complaint as for a mere creditor's action we are unable to perceive any

support for either of the grounds not argued. Regardless of the general nature of the complaint and of the prayer for relief, the dominant purpose of the pleader is unmistakably stated in the allegation that the action is brought "for the sole purpose of compelling payment from the said defendant's directors of the amounts that may be found due from them by reason of the matters and things hereinbefore set forth, and for satisfaction of the debts of all creditors of said defendant corporation."

The main ground of demurrer on which respondents' counsel rely is the fifth. Viewing the complaint only as an ordinary creditor's bill, such ground is readily seen to be untenable. The facts alleged amply show the existence of nonleviable corporate assets of various kinds to be recovered into the corporate treasury or some proper representative thereof for the benefit of creditors. There is the allegation that the defendant's directors are possessed in secret trust of corporate property, the allegations to the effect that contrary to the law of Arizona such directors obtained large amounts of corporate stock from the corporation without rendering thereto any substantial consideration therefor, allegations to the effect that by connivance of the directors half of the stock was issued and turned out for property of no considerable value as compared with the par value of the stock, and further allegations to the effect that by nonfeasance and misfeasance such directors squandered, lost, and misappropriated property of the corporation to the extent of over $100,000. Most of these wrongdoings are alleged to have been participated in by all of the directors.

The fact that two creditors, joined as plaintiffs, are not shown to have exhausted their remedy at law to collect their claims is referred to as a defect in the complaint. That is immaterial since the leading creditor who joined in initiating the litigation is shown to have exhausted his such remedy and so was competent to commence the suit. The rule is

that if in a suit of this sort, at the time of its commencement, there is an active party plaintiff so circumstanced as to be competent to maintain it, he may afterwards be displaced by another creditor, not so circumstanced, and made a defendant, or dropped out of the litigation altogether, or have other creditors, none of whom could have properly initiated the proceedings, joined with him as plaintiffs, without affecting the cause of action or the legal capacity of the parties to pursue the matter. *Harrigan v. Gilchrist,* 121 Wis. 127, 307, 99 N. W. 909.

It is suggested as a defect that the complaint fails to show the receiver was regularly appointed. On that it is sufficient to say that whether such be the case or not is immaterial to the cause of action. No receiver is necessary in order to commence an action of this sort. It is sufficient, as indicated, that there was a creditor competent to make the complaint, who was made a plaintiff. *Harrigan v. Gilchrist,* 121 Wis. 127, 271, 99 N. W. 909.

It is further suggested that the complaint fails to show the issuance and return unsatisfied of a valid execution. The opinion of the court is otherwise. The allegation that an execution was duly issued and was duly returned wholly unsatisfied is ample. By reasonable inference that suggests that a transcript of the justice's judgment was properly filed and the judgment docketed in the office of the clerk of the circuit court before the execution was issued. Under our practice many mixed matters of law and fact are properly pleadable according to the legal effect of the facts. *Hyman v. Landry,* 135 Wis. 598, 116 N. W. 236. The rule covers the case, that all facts necessary to sustain a complaint, reasonably inferable from the language used, are to be regarded as efficiently stated. *Morse v. Gilman,* 16 Wis. 504; *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921.

The further point is made that the complaint is fatally defective for failure to allege in compliance with Circuit Court

Rule XXVII, sec. 1, the true sum actually and equitably due on the judgment. That is ruled in favor of the appellants by *Marston v. Dresen,* 76 Wis. 418, 45 N. W. 110, and *Faber v. Matz,* 86 Wis. 370, 57 N. W. 39. The complaint states that the execution upon the judgment was returned wholly unsatisfied; that there is no collusion between the parties, and that the action is prosecuted for the sole purpose of compelling payment of dues to the corporation for the satisfaction of its debts. Such allegations were held in the cases cited to substantially comply with the rule; and further that the allegation required thereby is not of the substance of the cause of action, which is complete without it, and that at best absence thereof is a mere irregularity to be remedied by motion; that it does not constitute any legitimate ground for a demurrer.

In support of the contention that the circuit court has no jurisdiction of the subject of the action it is urged that the remedy in respect to dealing with, collecting, and distributing the effects of insolvent corporations in payment of its debts is governed by sec. 3216, Stats. (1898), and its associate sections, and that as they relate only to domestic corporations the common law in respect to the matter does not apply; that there is no remedy by a creditor's bill as to a foreign corporation. That is a mistake. It was early decided by this court that the common law respecting creditors' bills is supplemented, not displaced, by the statutes. *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57; *Harrigan v. Gilchrist,* 121 Wis. 127, 245, 99 N. W. 909.

In the last case cited the court reviewed at length the law on this subject, quoting, as the initial holding here, from *Adler v. Milwaukee P. B. Mfg. Co., supra,* this language:

"From this view of the general powers of courts of equity to manage and control the affairs of failing and bankrupt corporations it becomes a matter of very little practical importance whether . . . secs. 18 and 19 of ch. 148 of the Revision of 1858 [now sec. 3216, Stats. 1898] are operative or

not. If operative, they are in affirmance of the law as it was previously understood; if inoperative, no substantial change is occasioned. If they can be enforced, they only go to strengthen the powers which courts of equity heretofore possessed, to remove doubts, and to render the rules by which such proceedings are governed more stable and undeviating."

Further it is contended in support of the demurrer that the circuit court is without jurisdiction of the subject of the action; that a winding-up action against a corporation can only be brought at the domicile of the corporation, referring to such cases as *Hutchinson v. American P. C. Co.* 104 Fed. 182; *Stockley v. Thomas,* 89 Md. 663, 43 Atl. 766; *Condon v. Mut. R. F. L. Asso.* 89 Md. 99, 42 Atl. 944; and that neither such an action nor one to regulate the internal affairs of a corporation organized under the laws of another state can be maintained except at the domicile of the corporation, referring to such cases as *North State C. & G. M. Co. v. Field,* 64 Md. 151, 20 Atl. 1039, which was essentially an action of that character. It is sufficient to say as to such contentions that the primary purpose, at least, of this action is merely to conserve corporate assets within the jurisdiction of the court for the benefit of creditors in, or that may come into, such jurisdiction. It is neither a winding-up action nor an action to regulate the internal affairs of the corporation. If there be any matters stated in the complaint appropriate to such actions they are merely incidental to the main purpose of the suit. As the court at present is not required to go further than to test the question of whether the complaint states facts sufficient for a creditor's bill the two propositions suggested by counsel and argued at considerable length need not be discussed.

A clear distinction is made in the authorities between an action of this sort and a general winding-up action or one to regulate the internal affairs of a corporation. In *Hutchinson v. American P. C. Co., supra,* confidently relied upon by counsel, it is distinctly held that any state may take control

of property lying within its jurisdiction independently of any question of domicile, and in 23 Am. & Eng. Ency. of Law (2d ed.) 1006, also relied on by counsel, though it is said that a court of one state will not, in general, take charge of the business of a corporation organized under the laws of another state, that the place for a general receivership or entire winding-up proceedings is at the domicile, it is further said, in the same connection, that a receiver may be appointed for the property of a foreign corporation found within the jurisdiction of the court.

True, where there is a general receivership at the domicile of the corporation the foreign receiver would ordinarily be appointed as ancillary only, but that does not militate against the power of the court by virtue of its equity jurisdiction to deal with property within its reach belonging to the corporation, for the benefit of creditors invoking its authority, so far as necessary to protect the rights of such creditors.

Our attention is called to *N. W. Iron Co. v. Central T. Co.* 90 Wis. 570, 63 N. W. 752, 64 N. W. 323, where the question was raised, but not decided, as to whether a creditor's action of this kind may be maintained, language being used well calculated to cast doubt upon whether such an action is maintainable. Notwithstanding what is there said it is now considered that by the weight of authority and upon reason and principle as well the action is maintainable. We refer to 5 Thomp. Corp. §§ 6860, 6861; *Smith v. St. Louis Mut. L. Ins. Co.* 3 Tenn. Ch. 502, 505; *Murray v. Vanderbilt,* 39 Barb. 140, 147; *Redmond v. Hoge,* 3 Hun, 171; *Nat. T. Co. v. Miller,* 33 N. J. Eq. 155; *Richardson v. Clinton W. T. Mfg. Co.* 181 Mass. 580, 64 N. E. 400; *De Bemer v. Drew,* 57 Barb. 438; *Tinkham v. Borst,* 31 Barb. 407.

It is not claimed that the above authorities are in all respects directly in point, but they clearly recognize or declare the principle that a court of equity has ample authority to

entertain a suit against a foreign corporation to conserve its property within its jurisdiction to enforce payment of a judgment at law therein, legal remedies for its collection having been exhausted, and to vindicate the rights of all other creditors to recover their claims, who come into or are made parties to the litigation, so far as equity requires it.

Some other matters are discussed by counsel, but they do not seem material and so we will omit special mention of them. The complaint at this time is sustained, limited to the purposes of a creditor's action only.

By the Court.—The order is reversed, and the cause remanded for further proceedings according to law.

WISCONSIN NATIONAL LOAN AND BUILDING ASSOCIATION, Respondent, vs. PRIDE, imp., Appellant.

May 14—June 5, 1908.

(1) *Pleading: Default: Requiring proof before judgment.* (2) *Building and loan associations: Forfeiture of shares: Fines.* (3–5) *Mortgages: Foreclosure: Judgment for deficiency: Appeal: Receivers.*

1. In the absence of denial the allegations of the complaint stand confessed as against other than infant or nonresident defendants, although the trial court may, in its discretion, require proof thereof before rendering judgment.
2. Where a building and loan association has terminated the membership of a person in arrears, by declaring the shares forfeited, under sec. 2014, Stats. (1898), fines cannot thereafter be imposed for default in payment of instalments on his stock. These fines are imposed on the member in his capacity as such and are not authorized for default in the payment of interest on moneys borrowed by him in his capacity of a debtor or mortgagor.
3. In a judgment of foreclosure of a mortgage an order for the entry of a personal judgment for any deficiency is erroneous if there was no answer and no specific demand in the complaint for such deficiency judgment.

4. The erroneous inclusion, in the foreclosure judgment, of an order for personal judgment for deficiency, is ground for appeal although it does not appear that there will be any deficiency.
5. It was not an abuse of discretion to order, in a foreclosure judgment, that a receiver be appointed, on motion, if the premises should cease to be occupied as a homestead, where there was no denial of allegations in the complaint that the defendants had committed waste upon the premises by permitting them to be sold for taxes, that the premises are inadequate security for the mortgage debt, and that plaintiff fears further acts of waste, and where the mortgage expressly assigned the rents and profits to the mortgagee.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

Action to foreclose mortgage executed jointly by the appellant and Charles A. Pride, her husband, upon real estate in Milwaukee owned by them jointly. The complaint alleges default in payments of interest and instalments upon the stock in the plaintiff corporation, which were conditioned to be paid in the bond and mortgage, the accrual under the by-laws of fines to the amount of $55 at the time the action was commenced and at the rate of five cents per share per month on each instalment then and thereafter to be due, and also plaintiff's election to declare the mortgage debt due in its entirety; also that the premises are inadequate security, waste is threatened thereon, and that defendants have permitted the same to be sold for delinquent taxes. Answer, admitting most of the material allegations, was interposed by Charles A. Pride, but the appellant, though personally served with summons, did not answer, but appeared by attorney and was represented on the trial. The court rendered judgment for the amounts alleged to be due for principal and interest, for $119 of fines, and for other items secured; provided for foreclosure and sale of the mortgaged premises, and ordered personal judgment against both defendants for any deficiency that might arise; also ordered, in case the premises

cease to be occupied as a homestead, that a receiver might be appointed upon motion. From this judgment *Sarah E. Pride* appeals.

For the appellant *Pride* the cause was submitted on the brief of *Turner, Hunter & Goff.*

Pierson L. Halsey, for the respondent.

DODGE, J. 1. The first assignment of error is absence of evidence to support the finding of a liability secured by the mortgage for $119.25 of fines, or of any sum, for the reason that no proof was made of by-laws authorizing such fines, nor of any corporate action imposing them. The complaint alleges that the fines imposed in accordance with the by-laws amounted at the time of the commencement of the action to $55.65, and that further fines would accrue at the rate of five cents per share per month on each instalment, and a witness testified that, so computed, the amount at the date of the findings was $119.25. As against appellant these allegations of the complaint were without denial, she having interposed no answer. In the absence of denial the allegations of the complaint stand confessed in nonpresence of infant or nonresident defendants, although a discretion rests in the trial court to require proof thereof before rendering judgment if he shall think necessary to safety. *Sibley v. Weinberg,* 116 Wis. 1, 92 N. W. 427. This rule would justify the judgment but for the fact that plaintiff did introduce evidence which is brought before us by the bill of exceptions. By that evidence, and by the undenied allegations of the complaint, it was established that at or before the time of commencing this action the corporation had exercised its right under sec. 2014, Stats. (1898), to forfeit the defendant Charles A. Pride's shares of stock and to terminate his membership therein. It is very obvious that the statute does not contemplate that a person shall continue liable month by month for fines upon instalments agreed to be paid on stock

in a building and loan association after he shall have ceased to be such member by the act or consent of the corporation. These fines under the statute are imposed on the member in his capacity as such. They are not authorized to be imposed for default in payment of interest on moneys that he may have borrowed from the corporation in his capacity of a debtor or mortgagor. Therefore, while the court's allowance of fines to the extent of $55.65 accrued to the time of forfeiture is supported by the allegations of the complaint and not refuted by evidence, the amount allowed for fines accruing after that time and included in the judgment is in defiance of undisputed evidence, and the inclusion thereof in the judgment was a material and prejudicial error.

2. The judgment orders the entry of a deficiency judgment against the appellant. The right to such a judgment in the foreclosure of a mortgage is purely statutory. *Witter v. Neeves,* 78 Wis. 547, 47 N. W. 938; *Marling v. Maynard,* 129 Wis. 580, 109 N. W. 538. The only support therefor is sec. 3156, Stats. (1898), providing that the plaintiff may unite with his claim for foreclosure "a demand for judgment for any deficiency." The complaint before us contains nothing in addition to the prayer for foreclosure and sale except the usual prayer for general relief, "as is provided by law in such cases and as may be just and equitable." This is in no reasonable sense a demand for the special statutory deficiency judgment contemplated by sec. 3156. It does not fairly notify a defendant of any purpose on the part of the plaintiff to seek such relief. By sec. 2886, Stats. (1898), it is provided: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." In view of these considerations, and the clear words of the statute, we cannot doubt that the portion of the judgment ordering a deficiency judgment is erroneous because in excess of the relief demanded in the complaint. Sec. 2886, Stats. (1898); *Zwickey v.*

Haney, 63 Wis. 464, 23 N. W. 577; *McKenzie v. Peck,* 74 Wis. 208, 42 N. W. 247. It is suggested that no appeal lies therefrom for the reason that the appellant is not as yet injured, because there may be no deficiency. While this argument is not without weight if the question might be considered *res nova,* it is in defiance of numerous decisions of this court to the effect that such a judgment as now before us is the final judgment in the action, conclusive of the rights of the parties, and that erroneous inclusion therein of an order for personal deficiency judgment is ground for appeal therefrom. *Gaynor v. Blewett,* 86 Wis. 399, 57 N. W. 44; *Pereles v. Leiser,* 123 Wis. 233, 101 N. W. 413.

3. Further error is assigned on the order for appointment of a receiver upon motion on the foot of the judgment in case the premises cease to be occupied as a homestead. This order is supported by the undenied allegations of the complaint that defendants have committed waste upon the premises by permitting them to be sold for taxes, that the premises are scant and inadequate security for the sum secured, and that plaintiff fears further acts of waste. These allegations are taken as true, and are supplemented by the express agreement in the mortgage assigning to the plaintiff the rents and profits. We cannot think the order for a receiver, after the defendants shall have abandoned their homestead occupation, is an abuse of judicial discretion.

By the Court.—Judgment is modified as of its date by reducing the amount due on the mortgage to $5,696.81 and by reducing the total amount adjudged in favor of the plaintiff to the sum of $6,036.81; and it is further modified by striking therefrom the order that judgment be rendered against the appellant, *Sarah E. Pride,* for the deficiency arising on foreclosure sale. As so modified it is affirmed; the appellant to recover costs in this court.

KLOTZ, Respondent, vs. POWER & MINING MACHINERY COMPANY, Appellant.

May 14—June 5, 1908.

Master and servant: Injury from unguarded gearing: Contributory negligence: Court and jury.

1. **Although, in a case where an injury to an employee was caused by the negligent omission of his employer to guard or protect his machinery, sec. 1636*jj*, Stats. (Supp. 1906), abrogates the rule which bars recovery on the ground of assumption of the risk by continuance in the employment, it does not affect the employer's right to the defense of other phases of contributory negligence.**
2. **In an action for injuries to an employee caused by his arm being caught in the exposed gearing of a lathe at which he was working, the evidence is *held* to sustain findings by the jury to the effect that such gearing was dangerous to employees and that the injury was one reasonably to have been anticipated.**
3. **Though the danger in such case was obvious and readily appreciated, the employee cannot be said, as matter of law, to have been guilty of contributory negligence merely because, while working at the lathe, his sleeve was caught by and his arm drawn into the exposed gearing. The inquiry is one of fact for the jury, as to whether, under the conditions, he used care reasonably commensurate with the risk.**

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action for damages for personal injuries received by the plaintiff at the plant of the defendant in having his arm drawn into an unprotected and exposed gearing on a lathe. The complaint alleges that this gearing was so situated as to be dangerous to employees, that it was wholly unguarded, and that such gearing generally is and can be guarded without interfering with the usefulness and operation of the machine. The negligence assigned is the failure of the defendant to furnish a reasonably safe appliance and a failure to provide proper guards to prevent an employee being caught in the gearing. The answer denied negligence,

alleged contributory negligence on the part of the plaintiff, and denied that the gearing could be guarded without impairing the usefulness of the machine.

The evidence showed that the plaintiff knew of the position and condition of the gearing; that his position when operating the lathe was in front of and facing the machine and pieces of steel placed lengthwise of the lathe; that the gearing, composed of several cog-wheels, was on the end of the lathe frame at his left; that it was his duty to keep the lathe clear of steel chips which fell from the bolts which he was turning and shaping; and that he reached for a stick which was placed against a steel post located near and a little back of the gearing in order to clean away the chips. It appears that plaintiff stepped to a position near the gearing, and, stooping over, reached with his left arm and picked up the stick with his left hand. While resuming his upright position the sleeve of his jacket was caught in the teeth of the gearing and his arm was drawn into them, causing the injuries complained of. It is not controverted but that the stick was appropriate to remove the steel shavings and that plaintiff was justified in using it for this purpose.

The case was tried to a jury and a general verdict was returned awarding plaintiff $300 as damages. This is an appeal from a judgment in plaintiff's favor for such damages and costs.

Charles A. Vilas, for the appellant.

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.*

SIEBECKER, J. In the absence of the statutory provision—sec. 1636*jj,* Stats. (Supp. 1906; Laws of 1905, ch. 303),—under the common-law principle it is clear that plaintiff would be held to have assumed the risk arising from the absence of a proper guard for the gearing in which he was caught and injured. But this section of the statutes enacts that "if it appear that the injury was caused by the

negligent omission of his employer to guard or protect his machinery . . ." where said employee was injured, as required by law, then continuance in such employment by such employee, "with knowledge of such omission, shall not operate as a defense." Counsel for the respective parties are agreed that this statute abrogates the previously existing rule which barred recovery in cases wherein the injured person had assumed the risk. This change in the law does not, however, affect the employer's right to the defense of other phases of contributory negligence. The effect of such legislation in this respect was considered in *Buckner v. R. & D. R. Co.* 72 Miss. 873, 18 South. 449, and the court states the effect thereof in these terms:

"The effect of this is not to destroy the defense of contributory negligence by a railroad company, but merely to abrogate the previously existing rule that knowledge by any employee of the defective or unsafe condition of the machinery, ways, or appliances shall not of itself bar a recovery. . . . They, like others not employees, must not be guilty of contributory negligence, if they would secure a right of action for injuries."

Other cases sustaining the position are *Norfolk & W. R. Co. v. Cheatwood's Adm'x,* 103 Va. 356, 49 S. E. 489; *Narramore v. C., C., C. & St. L. R. Co.* 96 Fed. 298; *Schulte v. Pfaudler Co.* 150 Mich. 427, 113 N. W. 1120.

Under the issues raised the court submitted to the jury by proper instructions the inquiry whether the gearing in question was so located as to be dangerous to plaintiff and other employees in the discharge of their duty, whether the defendant ought to have anticipated that some injury would probably result to employees therefrom, and whether plaintiff was guilty of negligence which contributed to produce the accident. The jury by their general verdict found the defendant liable, thus necessarily determining that the gearing in its unprotected condition was dangerous to employees in the discharge of their duties; that the injuries were such as defendant ought reasonably to have anticipated; and that

plaintiff was free from negligence contributing to cause the injury. The case presented by the evidence amply sustains the finding that the exposed gearing was a menace and danger to employees and that the injury was one within the field of reasonable anticipation.

Appellant specially assails the verdict as to the finding that plaintiff was free from contributory negligence and avers that the evidence shows that the plaintiff was guilty of negligence *per se* in placing his arm in such close proximity to the gearing in reaching for the stick as to cause his sleeve to be caught in the teeth of the gearing. We cannot hold that this act and the manner of performing it show a want of ordinary care respecting his personal safety. Though this danger was obvious and readily appreciated, yet it cannot be said that persons undertaking to perform such a service in close proximity to such a machine are shown guilty of contributory negligence if in the operation their garments come in contact therewith. Under such circumstances the inquiry is one of fact as to whether the operator in the light of such conditions used "care reasonably commensurate with the risk to avoid injurious consequences" (*Narramore v. C., C., C. & St. L. R. Co., supra*), and is to be resolved by the jury upon the evidence. The instant case presents a state of facts which is not so clear in its inferences that the question of negligence can be determined as a matter of law.

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." *Richmond & D. R. Co. v. Powers,* 149 U. S. 43, 13 Sup. Ct. 748.

We are of opinion that the court properly submitted this question to the jury.

By the Court.—Judgment

OKERSHAUSER, Plaintiff in error, vs. THE STATE, Defendant in error.

May 14—June 5, 1908.

Criminal law and practice: Disqualification of juror: Waiver.

Where, in a criminal action, upon the examination of a juror as to his qualifications, it appeared that he was disqualified by reason of his inadequate knowledge of the English language, the defendant, by failing to challenge such juror for cause or otherwise object to his presence on the jury, waived all objections to his competency.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

For the plaintiff in error there was a brief by *R. S. Witte,* attorney, and *Lyman G. Wheeler,* of counsel, and oral argument by *Mr. Witte.* They cited, among other cases, *Jennings v. State,* 134 Wis. 307, 114 N. W. 492; *State v. Lockwood,* 43 Wis. 403; *In re Staff,* 63 Wis. 285, 23 N. W. 587; *Norval v. Rice,* 2 Wis. 22; *May v. M. & M. R. Co.* 3 Wis. 219; *Bennet v. State,* 24 Wis. 57; *Sutton v. Fox,* 55 Wis. 531, 13 N. W. 477.

For the defendant in error there was a brief by the *Attorney General, Francis E. McGovern,* district attorney, and *A. C. Backus,* assistant district attorney, and oral argument by *Mr. Backus.* They cited *State v. Vogel,* 22 Wis. 449; *Hogan v. State,* 36 Wis. 226; *Bonneville v. State,* 53 Wis. 680; *In re Staff,* 63 Wis. 285; *Flynn v. State,* 97 Wis. 44; *In re Roszcynialla,* 99 Wis. 534; *Emery v. State,* 101 Wis. 627; *Cornell v. State,* 104 Wis. 527; *Schwantes v. State,* 127 Wis. 160; *State v. Madigan,* 57 Minn. 425; *Drake v. State,* 5 Tex. Ct. App. 649; *U. S. v. Baker,* 3 Ben. 68; *Case of a Juryman,* 12 East, 230; *Wassum v. Feeney,* 121 Mass. 93; *Cole v. Lehlback,* 160 U. S. 293; *Brewer v. Jacob,* 22 Fed. 217; *Greenup v. Stoker,* 8 Ill. 202.

TIMLIN, J. The plaintiff in error was convicted in the municipal court of Milwaukee county and sentenced to imprisonment in the house of correction for one year after having been found guilty by the verdict of a jury.

The only point argued in the brief of plaintiff in error is that Ignatz Gorski, one of the jurymen, was not of sufficient intelligence to qualify him as a juror and did not have sufficient knowledge of the English language to understand the nature of the evidence or any of the arguments or proceedings in the case. It appeared that when the jury was called this juror was examined with reference to his qualifications by the assistant district attorney and by the attorney for the plaintiff in error. He testified that he had no bias or prejudice for or against the prosecution of the class of cases in question, no interest in the outcome of the case, no bias or prejudice for or against the defendant, and had formed or expressed no opinion as to his guilt or innocence. He understood the defendant in a criminal case is presumed innocent until he is found guilty, that the burden of proof was on the state, and there was nothing to prevent him giving the defendant the presumption of innocence. These answers were made in monosyllables. Several more complicated questions were not answered. Neither counsel pressed for an answer, but the juror did testify as follows: "Question by counsel for plaintiff in error: Do you understand the English language clearly so that you will understand all the evidence that is introduced here? *A.* No." After this several other questions remained unanswered, but the juror was accepted without challenge by the state or by the plaintiff in error. After his conviction the plaintiff in error moved for a new trial upon affidavit averring the foregoing disqualifications of the juror Gorski, and that plaintiff in error did not know of such disqualifications prior to the rendition of the verdict in the action. The court denied the motion for a new trial.

There is some evidence tending to show that the juror had some meager qualifications, but we will assume for the purpose of this decision that he was wholly disqualified by reason of his inadequate knowledge of the English language. The examination of the juror shows that the plaintiff in error had notice of this disqualification and failed to challenge the juror for this or any other cause. A party to a lawsuit, civil or criminal, is in court for the purpose of trying his cause openly and fairly, and is not justified in lying in wait for errors on the part of the trial court relating to matters which he fails to bring to the attention of that court. It has long been the law of this state that objection to a juror on the ground that the latter was not a citizen of the United States and understood the English language imperfectly must be raised by challenge for cause before trial, and cannot be raised for the first time upon motion for a new trial after an adverse verdict. *Bonneville v. State,* 53 Wis. 680, 11 N. W. 427. The case at bar goes farther, however, because the plaintiff in error was informed before the trial by the answer of the juror of the very disqualification which he now urges. He failed to challenge the juror for cause or otherwise object to his presence on the jury. It is as if he expressly assented that Gorski should form one of the panel of jurors. As was said in *Emery v. State,* 101 Wis. 627, 78 N. W. 145: "Silence, when objection ought to be made, works a waiver as much as express assent." Other cases are cited in the brief of the attorney general.

Counsel for plaintiff in error contends upon the authority of *Jennings v. State,* 134 Wis. 307, 114 N. W. 492, and other cases of that class, that because it is a rule of law in this state that one on trial for a criminal offense could not waive his right to a trial by a jury of twelve men it follows that he could not waive the disqualification of the juror Gorski. We cannot assent to the correctness of this proposition. The rule of *Jennings v. State, supra,* is not to be ex-

tended, and, curiously enough, does not apply where the legislature has enabled the accused to make even the waiver there considered. Sec. 4701, Stats. (1898), provides that the impaneling and qualifications of the jury, the challenge of jurors for cause, etc., shall be the same in criminal cases as provided by law in civil cases. It is provided by sec. 2881, Stats. (1898), that no irregularity in the impaneling of petit jurors shall be sufficient to set aside the verdict unless the party making the objection was injured by the irregularity or unless the objection was made before the returning of the verdict. We must hold that the plaintiff in error waived all objection to the competency of the juror Gorski.

By the Court.—The judgment of the municipal court is affirmed.

EGAN, Plaintiff in error, vs. THE STATE, Defendant in error.

May 14—June 5, 1908.

Criminal law: Conviction of lesser offense: Burglary in daytime: Pleading and proof.

Burglary in the daytime being merely a lower grade of offense than burglary in the nighttime, it is not essential in a prosecution for the former offense to allege or prove that it was committed in the daytime.

ERROR to review a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

For the plaintiff in error there was a brief by *Morse & Williams,* and oral argument by *R. L. Morse.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

KERWIN, J. The plaintiff in error, hereinafter called defendant, was charged in the information with the crime of burglary in the daytime under sec. 4410, Stats. (1898), committed on the 15th day of August, 1907, and pleaded not guilty. He was tried in the circuit court for Fond du Lac county, found guilty, and sentenced to confinement in the state reformatory at Green Bay, Wisconsin, for the term of one year, the term of confinement to begin at noon November 23, 1907. It appears from the evidence that the time within which the crime could have been committed included nighttime and daytime.

The only error complained of is in the following instruction:

"But if the evidence satisfies you beyond a reasonable doubt that the defendant broke and entered the dwelling house charged with the intent to steal and carry away the property of the Dupies at some time about the time alleged, and does not satisfy you beyond a reasonable doubt that it was during the hours constituting nighttime, you should then convict of the offense charged. But if you do find beyond a reasonable doubt that the defendant broke and entered the building with the intent to steal as stated, and also find beyond a reasonable doubt that such breaking and entry was made in the nighttime, as this time has been defined to you, then you should acquit."

Under this charge the jury were not permitted to find defendant guilty if they found beyond a reasonable doubt that the burglary was committed in the nighttime, but permitted only to convict in case they were satisfied beyond a reasonable doubt that the burglary was committed, but were not satisfied beyond a reasonable doubt that it was committed during the hours constituting the nighttime. We think this instruction was sufficiently favorable to the defendant. To hold that there could be no conviction upon an information for burglary in the daytime, where the jury could not say beyond a reasonable doubt that the commission of the act

may not have extended into the nighttime, would seem to be allowing the defendant to go unpunished upon a technicality well-nigh absurd. Many cases might arise where it would be difficult, if not impossible, for a jury to determine beyond a reasonable doubt on which side of the line between day and night the offense was committed, and yet we cannot think it would be good administration of the law to allow criminals to go unwhipped of justice in such cases upon the splitting of a hair between day and night, where it appeared clearly that no prejudice could be done defendant even if the offense were committed in the nighttime, though the information charged daytime. At common law, where the crime could only be committed in the nighttime, time was an essential element of the offense. Not so under our statute, however, which makes the offense punishable when committed in the daytime or nighttime, and imposes a heavier punishment if committed in the nighttime. Here the jury under the charge were permitted to acquit defendant if they found beyond a reasonable doubt that the offense was committed in the nighttime, but if they could not so find, but found beyond a reasonable doubt that the offense was committed, but could not fix the time beyond a reasonable doubt whether in the daytime or nighttime of August 15th, they might find defendant guilty. On the 15th day of August, the day charged, daytime began at 4:07 a. m. The evidence shows that the crime was committed between 8:45 p. m. August 14th and 6:15 a. m. August 15th, so it will be seen that the time within which the offense was committed overlapped the night and a part of the day. We think it clear that the time of day was not a material element of the offense charged, since burglary in the daytime is a lower grade of offense than burglary in the nighttime, and a lighter punishment imposed therefor. So, even if the burglary were committed in the nighttime, the defendant was not prejudiced by the conviction for burglary in the day-

time, the allegation of nighttime simply affecting the grade of punishment and not being an essential element of the offense. This seems to be the rule in Massachusetts under statutes similar to our own. *Comm. v. Reynolds,* 122 Mass. 454; *State v. Kane,* 63 Wis. 260, 23 N. W. 488. Under the rule laid down in *Comm. v. Reynolds, supra,* in charging the lower grade of offense it is unnecessary to negative circumstances which would render the offense more aggravated. The elements of the offense being the same in burglary in the nighttime and burglary in the daytime, but the grade of punishment only differing, it is sufficient in a prosecution for the lesser offense to allege and prove burglary, and whether committed in the daytime or nighttime warrants punishment for the lesser grade, burglary in the daytime. *State v. Kane,* 63 Wis. 260, 23 N. W. 488. The allegation that the burglary was committed in the daytime was unnecessary to a charge of this degree of the offense. The general allegations of breaking and entering, with the intent designated in the statute, would have been sufficient to warrant a conviction for burglary in the daytime without any allegation in the information that it was committed in the daytime. *Nicholls v. State,* 68 Wis. 416, 32 N. W. 543; *Comm. v. Reynolds,* 122 Mass. 454. This is upon the theory that in a prosecution for the lesser grade of offense time is immaterial, and under a statute like our own conviction may be had for the lower grade of offense, burglary in the daytime, though the evidence shows that it was committed in the nighttime, where there can be no doubt but that the conviction would be a bar to any other prosecution for the same offense. *Comm. v. Reynolds, supra.* In this case (122 Mass. 457) the court said:

"We are therefore of opinion that the allegation that the offense was committed in the daytime was not essential, and that it was competent for the government to prove the breaking and entering with intent to commit larceny. Whether

in the daytime or night was immaterial. The defendant could only be convicted and be liable to punishment under [Gen. Stats. 1860, ch. 161] sec. 14. If the jury were satisfied that it was done in the daytime, it came within the language of the section. If in the nighttime, then proof of the aggravated offense would justify conviction for the offense of lower grade. The defendant cannot complain, if the offense was committed in the nighttime, that he has been subjected to the lesser penalty; and his conviction will be a bar to any subsequent indictment charging him with the same offense with the aggravating circumstance. *Comm. v. Burke,* 14 Gray, 100, and cases cited. The evidence as to the hour when the offense was committed becomes immaterial, and its competency need not be considered."

It may be said in passing that the authorities are not altogether in harmony upon the subject; but we think the better rule is that where the statute as in this state provides for punishment for burglary committed in the daytime and also burglary committed in the nighttime, and provides a heavier punishment for burglary committed in the nighttime, it is not necessary to a conviction of burglary in the daytime to allege or prove that it was committed in the daytime. 2 Bishop, New Crim. Proc. § 133*a; State v. Kane,* 63 Wis. 260, 23 N. W. 488; *Nicholls v. State,* 68 Wis. 416, 32 N. W. 543; *Comm. v. Reynolds,* 122 Mass. 454; *People v. Barnhart,* 59 Cal. 381; *Butler v. People,* 4 Denio, 68; *Wilks v. State* (Tex. Crim.) 51 S. W. 902; *Bruen v. People,* 206 Ill. 417, 69 N. E. 24. Without pursuing the discussion further it is sufficient to say that there was no error in the charge, and the evidence was ample to warrant the jury in finding beyond a reasonable doubt that the defendant committed the burglary charged between 8:45 p. m. of August 14th and 6:15 a. m. August 15th.

By the Court.—The judgment of the court below is affirmed.

MONTGOMERY, Plaintiff in error, vs. THE STATE, Defendant in error.

May 15—June 5, 1908.

Criminal law: Homicide: Withdrawal of lesser degrees from jury: Acquittal: Conviction of higher degree: Reversal: Jeopardy: Premeditation and heat of passion: Evidence: Confidential communications: Husband and wife.

1. On the first trial under an information charging murder in the first degree the court withdrew from the consideration of the jury all lesser degrees of homicide, holding that there was no evidence warranting the submission of any of them. Defendant was convicted, but on writ of error the judgment was reversed and it was held that the evidence did not warrant the conviction of murder in the first degree and that certain degrees of manslaughter should have been submitted to the jury. *Held*, that there had been no acquittal as to any of the degrees of homicide, nor had the accused been in jeopardy so as to preclude his conviction, on a second trial, of any degree of murder or manslaughter—all of which are included in the charge of murder in the first degree.
2. Premeditated design and heat of passion are not necessarily inconsistent terms when used with reference to a homicide.
[3. Whether, upon the trial of a husband charged with premeditated murder of his wife, letters written by her to him shortly before the homicide, when offered in evidence on his behalf to show the absence of ill-feeling between them, were properly excluded as being confidential communications, is not determined.]
4. The state of feeling which such letters tended to prove being abundantly proven by parol testimony, and the jury having found that the killing was not premeditated but was done in the heat of passion, so that defendant was guilty of manslaughter in the second degree only, the error, if any, in the exclusion of the letters was not prejudicial.
5. A letter written by the deceased to the defendant prior to their marriage three years before the homicide, was properly excluded as too remote.
6. The evidence in this case is *held* to sustain a conviction of manslaughter in the second degree.

ERROR to review a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The plaintiff in error, who will be hereinafter referred to as the defendant, was from 1900 to 1903 a farmer, living about seven miles east of the village of Warrens, in Monroe county. He was forty-one years old at the time of his wife's death, May 30, 1903. He had been a widower for some years prior to his marriage to the deceased in 1900, living on a small farm with his children. The deceased's maiden name was Blanche Howard. Prior to her marriage the deceased had taught school in the district where he lived and elsewhere, and thereafter continued her vocation for a considerable part of the time. She was about twenty-five years old at the time of her marriage. Her weight was 130 pounds. Defendant weighed over 200 pounds, was rather high tempered, and years before he had been convicted of personal assault upon another, and was somewhat addicted to the use of intoxicating liquor. The deceased taught school at Stowell, some distance from her home, in Monroe county, in April and May, 1903, and during that time visited her husband every two weeks and he visited her about as often, and letters were written by each to the other, at least three by the deceased and two by the defendant.

On May 29, 1903, defendant drove with his team and buggy to Warrens and took the train to Stowell and spent the night with his wife at Mr. Belcher's, where she was boarding. During the night Mr. and Mrs. Belcher heard angry talk and crying in the bedroom occupied by the defendant and the deceased, and the next morning she showed plainly that she had been weeping. The defendant and his wife took the morning train for Warrens, where they spent the day attending the exercises of Decoration Day. They both drank beer and whisky with their friends, but neither became intoxicated, and near 6 o'clock in the afternoon started for home. The team, one rather a slow horse and a colt, were hitched to a single-seated, side-spring road wagon, with a high back seat. The right-hand spring being weak,

the deceased rode on that side. They both then appeared to be in usual health and spirits and to feel friendly towards each other.

The defendant states that soon after leaving town the deceased complained of feeling faint and asked for the whisky bottle; that he had a pint flask, one third to one half full, from which she then drank and from which she later took another drink, and that he drank what was left and threw the bottle away; that a few minutes thereafter she caught him about the neck, saying she had been wicked, and told him about her improper relations with a man at Stowell. Defendant says that he did not believe her statements, but he took an envelope out of his pocket which contained a confession which she had previously made of other similar conduct, and threatened to send it to her father if she did not stop telling lies, quit teaching school, and stay at home where she ought to be; that she asked him to destroy the paper, but he refused; that she then tried to grab it, and when she could not she clutched right into his face; that he caught hold of her and held her until she stopped struggling; that after going about ten rods, as the horses were walking, she got out of the buggy, and that he got out and helped her in; that she acted kind of dazed, and he thought she had taken too large a drink of whisky; that he was not angry when his wife made the confession of wrongdoing; that similar confessions were made at times when they were at home, and had been overheard by his daughter Nina.

Defendant states that after his wife returned to the buggy she looked faint and he put his arm round her and she leaned up against him, and they drove along in that way for nearly two miles; that then she sat up and he took the whip to start the horses, and as he returned the whip to the socket she pitched forward and he thought her face struck the "ex" of the buggy near the hub; that she fell onto the ground and that the buggy ran over her; that he stopped the team as

quick as he could, jumped out, and went back and picked her up; that then she had bruises on her nose and lips; that when he led her back to the buggy she commenced to turn round, tried to get away, and "hollered," frightening the team so that he had to run and catch them and tie them to a telephone post; that his wife started back towards Warrens, and that as soon as he got the horses tied he ran and caught her and brought her back to the buggy; that he started to untie the horses, and his wife started towards Warrens and he had to go after her; that when he caught her she pulled away from him and threw herself on the ground; that he helped her up, talked with her a few minutes, and then got her back into the buggy again. He was here seen by an acquaintance, Roy Lamb, who was ten or fifteen rods distant to the west, approaching on the same road. Defendant says he untied his team, got into the buggy and put his arm around his wife, and started the team for home at a fast pace—one horse was running and the other trotting; that he knew there was something wrong and that his wife had hurt herself, and he thought the best thing to do was to get her home. It may here be noted that Mr. Lamb was accompanied by his sister and they might have given assistance if any was needed, but the defendant did not wait their approach. They turned off upon another road a short distance from this point.

Defendant states that after the deceased got into the buggy at this time she sat leaning towards him, with her head against him on the right side, and that he had his arm round her waist; that they proceeded in this manner until within about three quarters of a mile from home, near the Greens' residence, when she raised up and said that she felt all right; that he reached for the whip with his right hand to start up the team, and as he did so his wife fell out of the buggy between the wheels; that he grabbed for her with his right hand; that his hold broke loose and he then grabbed her by the leg; that he hung to her for a moment, and that she finally fell

onto the ground; that she was dragged some distance by reason of his holding to her and the horses running; that he stopped the horses as soon as he could, ran and got his wife, carried her in his arms, and lifted her into the buggy on the left-hand side, holding his wife with her face on his breast. The defendant was here seen by Pearl Green and her brother, Tom Green. Defendant did not stop at this house for assistance, but drove rapidly by to his own home. Tom Green went to the spot where the deceased fell out of the buggy the last time and found that the body had been dragged some fifty-three paces along the highway while, as the defendant says, he was holding onto her leg.

Defendant says he drove fast until he reached home and that his wife was unconscious during that time; that when he got home his daughter Nina came out and they helped the deceased out of the buggy and into the house; that Nina said she could not wash her mother, and that she took care of the team while he bathed his wife's face; that he found one eye was swelled shut and her face was badly bruised; that he laid her on the bed and went to the telephone and called Dr. Sidell at Warrens; that his wife roused up, and after Nina came in she called her by name and wanted to be helped off the bed and out of the bedroom to the waterpail; that the deceased stood on her feet without help; that they gave her a drink of water, and she sat down in the chair and asked Nina if she was home and spoke of a little colt which she wanted to see; that defendant told Nina to go and drive the colt from the pasture; that Nina started out, and had gone a short distance when she heard the deceased call her name three times. Defendant and Nina both say that he followed her out of the door out of sight of the deceased, and that Nina followed her father inside, although he entered the house a trifle in advance of her. Nina says that the deceased was seated in a chair, unconscious, with her head leaning back against the wall, and that the defendant then said: "My

God, Nina, I believe Blanche is dead." Defendant testified that when he entered the room in advance of Nina his wife was upon the floor and that he lifted her up and placed her in a chair. Defendant and his daughter carried the deceased out in the front yard, where she could get fresh air, and where she immediately thereafter expired, according to their testimony.

The facts are fully stated in the report of this case upon the first appeal (128 Wis. 183, 107 N. W. 14) and this brief summary is given of the statements of the defendant for a better understanding of the issues here presented. This court held that the evidence given upon the first trial was not sufficient to sustain a conviction of murder in the first degree and that the trial court erred in not submitting to the jury the question as to whether the killing was not done in the heat of passion, so as to reduce the crime to manslaughter in the second or fourth degree. The action was remanded for a new trial, and defendant was tried on the same information and on substantially the same evidence and convicted of manslaughter in the second degree.

The action was brought to trial in Jackson county after a change of venue, and a motion was then made on behalf of the defendant that the indictment be quashed for the reason that the record showed the acquittal of the defendant of every crime included in the present information. The same question was presented by a plea in bar and also by a plea in abatement based on the record of the former trial. A demurrer to these pleas was sustained. At the close of the trial the defendant moved for a direction of verdict of not guilty and for the acquittal and discharge of the accused based upon the records and evidence. This motion was denied and the cause submitted to the jury with the result already stated. A motion to set side the verdict and for a new trial was denied and the defendant was sentenced to the state prison for seven years. The case is before the court for review upon writ of error.

For the plaintiff in error there was a brief by *A. H. Smith,* attorney, and *G. M. Perry* and *F. J. Smith,* of counsel, and oral argument by *Mr. Perry* and *Mr. A. H. Smith.*

For the defendant in error there was a brief by the *Attorney General, A. C. Titus,* first assistant attorney general, and *Wm. B. Naylor, Jr.,* district attorney of Monroe county, of counsel, and oral argument by *Mr. Titus, Mr. Naylor,* and *Mr. R. B. Graves.*

BASHFORD, J. The motions and pleas interposed on behalf of the defendant challenging the sufficiency of the information and urging former jeopardy are fully met by the decision of this court on the first appeal. It was there held that the evidence adduced did not justify a verdict of premeditated murder, and that there was error in refusing to give the instruction requested on behalf of the defendant that the jury might find from the evidence that the defendant was guilty of manslaughter in the second or fourth degree. It was there held that upon this information and upon substantially the same evidence the jury might have found that the killing was done in heat of passion and not from premeditated design, although the defendant had testified that he was not made angry by the alleged confessions of the deceased. The action was remanded for a new trial upon the same information and upon such evidence as might be brought forward to establish the guilt of the defendant and the degree of homicide if he should be again convicted. The trial court followed the rules of law laid down in that decision and the jury found the defendant guilty of manslaughter in the second degree. The particular objections raised to this judgment may therefore be regarded as *res adjudicata* and cannot, therefore, require extended consideration. It is urged that the trial court, by withdrawing from the jury on the first trial all offenses other than murder in the first degree, acquitted the defendant of such charges. This was simply an erroneous instruction given by the court,

and the defendant was not placed in jeopardy as to the minor offenses that were withdrawn from and which were not considered by the jury. *Hoffman v. State,* 97 Wis. 571, 73 N. W. 51; *Perkins v. State,* 78 Wis. 551, 47 N. W. 827.

The contention is made on behalf of the defendant that the jury on the first trial, by its verdict of murder in the first degree, which involves a premeditated design, in effect acquitted the defendant of any offense in which heat of passion is an essential element, as in manslaughter; that premeditated design and heat of passion are inconsistent terms and cannot both exist at the same time. The last statement may be true in the abstract with respect to a mental state, but it cannot be applied as a rule of evidence. There may be a premeditated design to kill. There may be sudden provocation, and in the heat of passion the crime may be committed, and it is then for the jury to determine from the testimony the degree of homicide. This was the state of the record in *State v. Johnson,* 1 Ired. Law (23 N. C.) 354, 35 Am. Dec. 742, the leading case cited by defendant's counsel. The court there sustained a verdict of murder, although it is clear from the opinion that a conviction of a less offense would have been approved. Under such circumstances one jury might believe that the offense was committed upon a premeditated design, and a second jury might believe from the same evidence that the crime was the result of sudden provocation and committed in the heat of passion. The authorities do not sustain the defendant's contention that the conviction of murder necessarily negatives an element of the lower offense of manslaughter. The statements found in text-writers and adjudicated cases referred to by counsel with respect to former jeopardy can have but slight application under the statutes and decisions of this state. The words "premeditated design," found in sec. 4338, Stats. (1898), defining murder in the first degree, signify merely an intent to kill. Sudden intent is not excluded. *Hogan v. State,* 36 Wis. 226; *Cupps*

v. State, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546. In *Hogan v. State* Chief Justice RYAN enters into an able and exhaustive discussion of the common and statute law upon the subject, and places a construction upon this statute which now has the full approval of the court. He says (p. 244):

"We take the 'premeditated design' of our murder in the first degree to be simply an intent to kill. Design means intent, and both words essentially imply premeditation. The premeditation of the statute does not exclude sudden intent, and need not be slow or last long. This very plainly appears, not only by the force of the words used, but also by the apparent use, throughout the definitions of murder and manslaughter, of the terms 'design' and 'premeditated design' to effect death as co-equal terms."

Applying the language to the instant case, the jury on the first trial must have been convinced that the defendant had previously, or upon provocation arising at the time, formed a design to kill his wife. If the evidence justified this conclusion he was guilty of murder in the first degree. The jury on the second trial must have found that there was no design to effect death, but that in the heat of passion arising from the quarrel he killed his wife in a cruel and unusual manner, which supports the conviction of manslaughter in the second degree. This view is further supported by the discussion of the subject found in the two opinions of Mr. Justice MARSHALL in *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

It is also contended that the decision of this court on the first appeal, that the evidence was not sufficient to sustain the verdict, acquitted the defendant of murder in the first degree. That rule was early discarded in this state. *In re Keenan,* 7 Wis. 695; *Benedict v. State,* 14 Wis. 423. This court in *State v. Parish,* 43 Wis. 395, in discussing the effect of a motion for a new trial, says (p. 401):

"When a verdict of guilty in a criminal case is set aside, all the proceedings on the trial are necessarily set aside and vacated with the verdict. So when the verdict is set aside

on motion of the accused, and he afterwards alleges that the trial and verdict put him in jeopardy of punishment, it may well be replied that the portions of the record by which alone the jeopardy can be proved have been set aside and vacated at his request, and that he has thereby deprived himself of the means of proving his allegation of jeopardy."

That rule, which is subject to the qualification indicated in the case cited below, applies to the objection urged as to the legality of the last conviction. *Birker v. State,* 118 Wis. 108, 94 N. W. 643, holds that when the act for which the accused is indicted is the same act for which he is convicted, the conviction of the lower degree is proper, although the indictment contains averments constituting the offense of the highest degree of the species of crime and omits to state the particular offense and circumstances characterizing a lower degree of the same crime. It is a familiar doctrine that upon indictment for murder in the first degree the defendant might in the first instance have been convicted of any lesser grade of homicide, because the less offense is included in the greater; but if upon the trial he is found guilty of manslaughter and that conviction is set aside, he cannot thereafter be convicted of murder in the first degree. *State v. Martin,* 30 Wis. 216; *State v. Belden,* 33 Wis. 120. We must hold, therefore, that there is no force in the objections urged against the procedure in this action.

Defendant's counsel strongly insists, with much plausibility, that the trial court erred in excluding letters written by the deceased to the defendant immediately prior to the date of the criminal act and while she was engaged in teaching at Stowell. This is urged especially upon the ground that the state had offered proof of the effect which defendant's letters, which were not produced, had upon the deceased when received by her, tending to show the existence of trouble between them, while it is claimed that the letters written by her to him show strong affection and good feeling. Counsel for the state insist that the letters were confidential communications between husband and wife and were therefore not ad-

missible under sec. 4072, Stats. (1898); and, furthermore, that the offer of the same did not come within any of the recognized exceptions to the rule excluding privileged communications. We are not prepared to hold that, upon the trial of the husband for the murder of the wife upon a premeditated design, letters received by him from her immediately prior to the commission of the crime are not admissible as showing the relations existing between the parties and as tending to elucidate the circumstances attending the act. The admissibility might rest upon the necessity of the case as tending to rebut the criminal intent, but we do not consider it necessary to decide the question upon the record as here presented. We have been referred to no authority directly in point and have been able to find none. It becomes material, therefore, to consider the circumstances under which the letters were offered and excluded.

The deceased, while engaged in teaching school during the months of April and May, 1903, some distance from her home, wrote her husband several times and received at least two letters from him. Mrs. Belcher, with whom deceased boarded at the time her school closed, May 29th, as a witness for the state testified that the defendant came for his wife that day, and that she heard them quarreling during the night which preceded the day of her death. Upon cross-examination, in answer to a question from defendant's counsel, this witness stated that the deceased cried when she got letters from her husband. Counsel for defendant now insists that this answer was not responsive to the question propounded; but it is to be noted that no motion was made to strike it out. Upon redirect examination this witness testified, without objection, that the deceased cried when she got a letter from her husband. "Every letter she got she would come and tell me and she cried." At such times "she was always downhearted and cried." There was no motion made by defendant's counsel to strike out this testimony.

It is now urged by defendant's counsel that the jury might have inferred from this testimony that a state of unkindness and ill feeling existed between husband and wife which her letters to him might have had a tendency to overcome. Such letters might have indicated her feelings towards him and also might have had a tendency to show his state of mind towards her, and in that view might have been material if he had been convicted of murder in the first degree; but as the jury has found that the crime was not premeditated, but was committed in the heat of passion, the mental state of the accused at some time prior to the commission of the offense has ceased to be of material consequence, and the rejection of the letters, if properly offered, cannot therefore be deemed prejudicial error. The testimony offered for the purpose stated was of the same nature as evidence of the defendant's good character. The proof would therefore go to the intent of the defendant. The evidence of good character was held not material in such a case. *Hogan v. State,* 36 Wis. 226. In the case cited the defendant was found guilty of murder in the second degree, the killing being perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed. It is said in the opinion, discussing the evidence of good character (p. 236):

"The nature and qualities of the act producing death are to be found in the act and circumstances of its commission; and the good or bad character of the accused can have no possible bearing upon them."

Moreover, a perusal of the letters, preserved in the record, shows that they throw no new or different light on the relations of the parties beyond that which the parol evidence disclosed; hence their exclusion was not prejudicial.

The objection to the admission of the letter written by the deceased to the defendant prior to their marriage was properly sustained. It was too remote to have any material bear-

ing upon any of the issues fairly presented for the consideration of the jury on this trial.

The evidence upon the last trial was in all material respects the same as upon the first trial, evidence which this court has held was adequate to support a conviction of manslaughter but not a verdict of murder in the first degree. Nevertheless, with lawyer-like zeal for a client in distress, counsel for defendant insist that the proof is not sufficient to support the verdict of manslaughter in the second degree. The bald fact stands admitted that the deceased, in usual health and spirits, left Warrens for her home in company with her husband, and within an hour thereafter came to her death in a most violent and brutal manner. During that fateful period she saw no one and spoke to no one but the accused and his daughter Nina. In the statement of facts the substance of the testimony of these two witnesses is given which in any manner tends to explain defendant's conduct or to exonerate him from criminal responsibility for the death of this unfortunate woman who had a right to look to him for protection. It is also proper to say further, that there is no direct affirmative proof except that of the defendant and his daughter that would tend to acquit him of this awful crime. Two juries by their verdicts have declared, as they might properly, that this testimony is wholly unworthy of belief. Excluding this proof, but one conclusion results, and that is that the defendant, in the heat of passion, caused the death of his wife in a cruel and unusual manner, and was therefore guilty as found by the jury. The direct testimony in support of the verdict has not been referred to, and need not be further than to state that we consider it ample to sustain the verdict. In forbearing to discuss the evidence establishing his guilt we accord to the defendant the charity of silence.

By the Court.—Judgment affirmed.

TIMLIN, J. I concur in the affirmance of the judgment of the court below. But, looking to the future, I think it well to spread upon the record a more detailed exposition of the points necessarily decided with reference to the defense of former jeopardy.

The accused was, on his first trial, prosecuted upon an information charging murder in the first degree and found guilty of this crime. On this first trial the court refused to submit to the jury the question whether or not the accused was guilty of manslaughter in the second degree or of manslaughter in the fourth degree, holding that there was no evidence which warranted the submission of either of these two offenses to the jury. This was held to be error and the judgment of conviction reversed. *Montgomery v. State,* 128 Wis. 183, 107 N. W. 14. It was also decided by this court in the Report last mentioned that the evidence did not warrant a verdict of murder in the first degree. The cause was thereupon remanded for a new trial. The accused was then put upon trial on the same information upon which he had been previously tried. He pleaded his former jeopardy in bar of the prosecution, made other motions raising this question, and showed that at the first trial there was withdrawn from the jury by the trial court the offenses of manslaughter in the second and fourth degrees, and he set forth the decision by this court that the evidence was not sufficient to warrant a conviction of murder in the first degree. Demurrers to these pleas were sustained and exceptions taken. The accused was then tried and convicted of manslaughter in the second degree, and the cause comes to this court again. Counsel for the accused now contends: (1) That, the trial court having at the close of the first trial withdrawn from the jury the charges of manslaughter in the first and second degrees, this was an acquittal of these charges, or at least the accused had been in jeopardy thereon. (2) The verdict of

murder in the first degree on the first trial was an express finding of the jury that no homicidal offense involving heat of passion was committed. (3) The decision of the supreme court that the evidence was not sufficient to sustain the verdict acquitted the accused of murder in the first degree.

The sum of counsel's argument, oral and written, on these points is that the jury in the first trial, by finding the defendant guilty of murder in the first degree, acquitted him of all homicidal crime the necessary essentials of which were negatived by that verdict; that the supreme court relieved the accused of that finding, but could not place him in jeopardy again for the said offenses theretofore and after the jury was impaneled and sworn withdrawn from the consideration of the jury by the instructions of the trial court. Compare *Schultz v. State* (opinion filed May 8, 1908) 135 Wis. 644, 653, 657, 116 N. W. 259. The distinctions appear to be that here there was one act charged in the information which by law stood as sufficient to charge seven different offenses, either of which might have been committed by the act charged; there there was one act charged in the indictment as constituting two different offenses. Here there was an instruction to the jury against the objection of the accused to the effect that the evidence was insufficient to support a conviction of two of the seven offenses; there there was an instruction to the jury at the instance of, or at least without objection from, the accused, that the evidence was insufficient to support a conviction of one of the two offenses. It is suggested that there is another ground of distinction in that all homicidal offenses are included in murder, and that not all threats are included in threats to do injury to property; and, as I wish to omit no point of distinction, I mention the suggestion, although it does not seem to me accurate or pertinent. Nevertheless the judgment here is affirmed.

The following opinion was filed June 18, 1908:

WINSLOW, C. J. (*concurring*). I fully agree with the result reached in this case, and wish simply to express in my own way what I conceive to be the grounds of the decision. The information charged the defendant with murder in the first degree. Under long-established and universal rules this charge included all lesser grades of homicide, and under it he could be lawfully convicted of any degree of murder or manslaughter which the evidence sufficiently proved. *State v. Martin,* 30 Wis. 216; *Birker v. State,* 118 Wis. 108, 94 N. W. 643; 1 Bishop, New Crim. Law, § 797. Had he been acquitted of murder in the first degree, and convicted of any of the lesser degrees of homicide upon his first trial, he could not thereafter have been again tried for murder in the first degree, even had a new trial been granted upon his own motion, because by such motion he only asked for and obtained a new trial of the charge of which he was convicted, and hence did not waive his constitutional protection against a second prosecution for the crime of which he was acquitted. *State v. Martin, supra.* But this was not the situation. The defendant was convicted on the first trial of murder in the first degree. When he prosecuted his writ of error from the judgment upon that conviction and obtained a reversal and a new trial, the case went back for retrial on the charge of murder in the first degree, which included all homicides of a lesser degree just as it did upon his first trial. He had by his own act in applying for a new trial waived his constitutional protection against a second trial for murder in the first degree, and necessarily waived his right to object to a new trial for any of the lesser degrees included within the charge of murder in the first degree, as to which charge he had thus consented that he might be again put in jeopardy. This is not a case where two separate crimes, neither of which is included within the other, are charged in the

same information, as was the case of *Schultz v. State,* 135 Wis. 644, 114 N. W. 506, 116 N. W. 259. In that case the court by instructions took from the jury the consideration of one of the separate offenses charged, and a verdict of guilty was rendered, which, under the instructions, this court held must be construed as meaning guilty of the other offense only. A writ of error was prosecuted by the defendant, and it was held to be addressed only to the offense of which he was convicted and not to the one of which he was not convicted, and hence that he had not waived his defense of former jeopardy as to the last-named offense. The distinction between that situation and the present seems to me so manifest as not to call for further elucidation. So it seems to me clear that upon the second trial the defendant might rightly be convicted of any degree of homicide which the evidence sufficiently proved.

As to the letters which were written by the wife to the defendant shortly before the homicide, I regard the question of their admissibility as one involved in much doubt; but, if admissible at all, it was only because they tended to show the state of feeling between the parties. If admissible for this purpose their exclusion was not prejudicial, because it appears upon examination of them that they tended to prove simply the same state of feeling which was abundantly proven by the parol testimony.

POLLOCK, Plaintiff in error, vs. THE STATE, Defendant in error.

May 15—June 5, 1908.

Criminal law: Homicide: Improper remarks by trial judge: Evidence: Immaterial errors: Intoxication of witness: Rebuttal: Experiments as to powder stains: Expert testimony: Instructions to jury: Degrees of homicide: Unnecessary killing.

1. Upon a trial for murder a witness for the state was cross-examined as to his movements and the time of day when he saw the deceased two days before the homicide, and found difficulty in fixing any exact times. Upon objection to such cross-examination as irrelevant and immaterial the court said: "I don't know what it has to do with it, but I will state this for the benefit of the witness: When you cannot state positively the time, you may say it was somewhere between 1 o'clock and 5, or whatever time you may have in mind." Also, when the witness objected to stating how much money he had loaned to the deceased, the court said: "You may answer and let him know whether it was a large or small amount." Again, when asked whether he was a member of a certain labor union, the witness answered, "That is my business." Afterwards he stated that he was a member, and was then asked why he said it was none of counsel's business when asked if he was a member, and the court said: "He probably thought so." *Held*, that such remarks did not constitute prejudicial error.
2. Where on a murder trial defendant claimed to have acted in self-defense, and there was testimony that a companion of the deceased, who was in the room at the time of a quarrel in which the latter was shot by defendant, picked up a cuspidor just before the shooting and that it was found to be broken after the affray was over, but there was no evidence that it was used as a weapon or as to how it was broken, rulings and remarks by the court as to the admission in evidence of the broken pieces of the cuspidor, to the effect that they might be received, together with certain broken chairs, and, if the jury found they were broken at the time in question, might be considered as tending to show the nature of the affray, are *held* not erroneous.
3. On a murder trial there was a question as to whether a witness for the prosecution had been with the deceased during the afternoon preceding the homicide, and several witnesses for the defense had testified to having seen them together in a certain

place at about 4 o'clock of that afternoon. Another witness then testified that he saw deceased at that time and place with a man whom he did not know and could not identify. The state moved to strike out this testimony, and the court said: "He didn't really give any." Afterwards the court told the jury that such remark was not well expressed and that he did not intend to intimate that the testimony was not credible or that it was not entitled to weight. *Held*, that this explanation removed any prejudicial error.

4. It was competent for the defense on a murder trial to show that a witness for the state was intoxicated at the time of the homicide, in order to discredit his testimony; but evidence that he was intoxicated an hour and a half later was properly excluded as immaterial.

5. Where on a murder trial the defendant claimed to have acted in self-defense and his testimony tended to show that when the fatal shot was fired he was struggling with the deceased and the muzzle of the pistol must have been within a few inches of the latter's vest, it was proper to permit the state in rebuttal, after testimony that there were no powder marks on the body of the deceased, to show experiments made by shooting the same pistol, using similar cartridges, through the vest at distances of two inches, eight inches, two feet, and four feet, resulting in powder stains upon the cloth when the pistol was fired at the two lesser distances, and to show by expert testimony that there would have been powder stains on the body if the pistol had been fired at a distance of six inches.

6. After instructing the jury as to necessary elements of manslaughter in the second degree under sec. 4351, Stats. (1898),—*i. e.* the unnecessary killing of another while resisting an attempt of such other to commit a felony or other unlawful act,—the court further told them in effect that if the killing was with premeditated design it was murder in the first degree, not manslaughter in any degree, unless justified under the law of self-defense. *Held*, that this instruction was not capable of causing the jury to believe that defendant, though acting in self-defense, might still be guilty of manslaughter in the second degree.

7. The evidence in this case is *held* to justify a finding that the killing was unnecessary and to sustain a conviction of manslaughter in the second degree under sec. 4351, Stats. (1898).

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed*

For the plaintiff in error there was a brief by *Rubin & Zabel,* attorneys, and *E. T. Fairchild,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Fairchild.*

For the defendant in error there was a brief by the *Attorney General,* and *A. C. Backus* and *F. C. Eschweiler,* assistant district attorneys, and oral argument by *Mr. A. C. Titus,* assistant attorney general, and *Mr. Eschweiler.*

WINSLOW, C. J. The plaintiff in error was charged with the murder of one Frank Tomlinson, September 6, 1906, at Milwaukee, and was convicted of manslaughter in the second degree, and prosecutes this writ of error to reverse the judgment which followed his conviction. The killing by shooting with a pistol was admitted, and the claim was that the defendant acted in self-defense.

The evidence shows that the plaintiff in error (hereinafter called the defendant) was at the time of the homicide an unmarried man nearly fifty years of age; that for about three years he had been rooming at 190 Fifth street in the city of Milwaukee, the latter part of the time with a woman named Bertha Krueger; that he was a structural iron worker and was employed by the Worden & Allen Bridge Company; that one Zemke had roomed at the same place about two years before the homicide and the defendant knew him; that defendant became acquainted with Tomlinson, who was also an iron worker, in July or August, 1906; that in the evening of Tuesday, September 4, 1906, Zemke, Tomlinson, and one Wiles called on defendant at his room and stayed some twenty or forty minutes and left; that on Thursday following Zemke and Tomlinson called again between 5 and 6 o'clock p. m., just after defendant had washed and dressed himself after his day's work and was about to go out after a pitcher of beer; that at defendant's invitation Zemke and Tomlinson sat down and ate some peaches, while defendant went out after the beer; that when defendant came back they

all had some beer and talked in a friendly way and Tomlinson went out after another pitcher; that when he returned Miss Krueger was in the room with defendant and Zemke; that afterwards Zemke went after another pitcher of beer; that about the time he returned a difficulty of some kind arose between Tomlinson and the defendant, which began with words, but ended in the defendant's shooting the deceased with a pistol in the abdomen; that deceased and Zemke then left the house; and that deceased was taken to the Emergency Hospital in a dying condition and died at about half-past 6.

According to Zemke's testimony no actual violence was offered by Tomlinson to the defendant, but when he (Zemke) returned with the beer Tomlinson was standing in front of defendant, who was sitting on a chair, and defendant had his hands on Tomlinson's hips; that defendant then got up, and he and Tomlinson moved westerly, facing each other, toward an alcove in which was the bed, the defendant's hands being still on Tomlinson's hips, and both were doing some talking; that Miss Krueger opened the drawer of a dresser and said, "Here, Jack," and in an instant the shot was fired, and the next he knew both men were lying on the bed, the defendant on the north end and Tomlinson on the south end; that Tomlinson then got up and went down stairs to the street with him (Zemke).

The testimony of the defendant and of Miss Krueger tended to show that Zemke and Tomlinson came to the defendant's room with the intention of doing the defendant some injury. According to their stories, which substantially agreed, it appeared that Zemke charged that Miss Krueger had said that he (Zemke) was a bum and owed her some board; that the discussion became general and acrimonious and the defendant and Tomlinson took part in it; that Tomlinson finally struck the defendant and knocked him on to the floor and got on him; that defendant got away and

Tomlinson pursued him, while Zemke picked up a cuspidor, apparently to throw at defendant; that defendant got to the dresser and opened it and got his pistol and warned Tomlinson to stop or he would shoot, but that Tomlinson still advanced and defendant backed into the alcove by the side of the bed; that Tomlinson then struck defendant, knocked him over on the bed, and jumped on him with his hands at his neck; that defendant then shot, and Tomlinson fell back on the other end of the bed, and then got up and left the room with Zemke.

The assignments of error will be taken up in their order as made.

1. It is claimed that the court made remarks in the presence of the jury, during the introduction of the evidence, which were so unfair and prejudicial as to call for reversal of the judgment. These remarks will be briefly noticed.

During the cross-examination of the state's witness Zemke he was examined at some length as to his movements and the time of day when he saw Tomlinson on Tuesday, two days before the tragedy, and found difficulty in fixing any exact times, and, upon objection by the state's attorney that this line of examination was irrelevant and immaterial, the court said:

"I don't know what it has to do with it, but I will state this for the benefit of the witness: When you cannot state positively the time, you may say it was somewhere between 1 o'clock and 5, or whatever time you may have in mind."

Again, when Zemke had stated that he loaned some money to Tomlinson and was asked how much, he objected to answering, and the court said: "You may answer and let him know whether it was a large or small amount." Again, after Zemke had stated that he marched with a labor union on Labor Day, being Monday before the tragedy, he was asked if he was a member of the organization, and answered, "That is my business," and after some further questions stated that

he was a member of Lodge No. 300. He was then asked why he said it was none of counsel's business when he was asked if he was a member, and the court said: "He probably thought so." It is said that these various remarks plainly indicated to the jury that the court sympathized with the witness. We have been unable to view the remarks as meriting any serious condemnation. The last one mentioned might better have remained unsaid, but the examination had been protracted to an extreme length upon very trivial and inconsequential matters, evidently to the annoyance of the court, and the remark was quite natural and cannot be dignified into prejudicial error.

A cuspidor was in the room at the time of the difficulty, and there was testimony, as before stated, that Zemke picked it up just before the shooting. It was found to be broken after the affray was over, but there was no evidence that it was used as a weapon nor as to how it was broken. The broken pieces were offered in evidence by the defense, and upon objection by the state the court said, in substance, that he did not see its materiality; that if there was evidence that it was broken by the deceased or by Zemke he would receive it in evidence; that he could not see that it was as material as the revolver, but, inasmuch as it had been seen by the jury, it might as well be received for what it was worth. Defendant's counsel then asked that the court correct the statement or intimation made that it was admitted simply because the jury had seen it, and the court declined to withdraw the statement, and again stated that he did not see the materiality of it, inasmuch as there was no testimony showing that it was used. Later in the trial, after two chairs, which the defense claimed were broken in the affray, had been received in evidence, the court said to the jury that both the chairs and cuspidor "were received and may be considered by the jury if it is found that they were broken at that time; the circumstances having such bearing upon the case indicat-

ing the character of the affair as you may find them entitled to receive, disregarding any remarks that may have been made by the court at the time of their reception." Defendant's counsel then asked the court to bear in mind that the cuspidor was offered not simply because it was broken, but because Zemke had it in his hand, to which request the court replied:

"As I say, they will be received together with all the evidence that was received at the time in explanation of how they became broken for the purpose of indicating the nature of the affray. If you believe and find that that testimony is credible, that is for you to determine and not for the court."

We have been unable to appreciate the force of the objections made to the court's remarks as to the cuspidor. Had it been unbroken, its physical appearance would certainly cut little or no figure, as it was not claimed to be exceptional in any way. The defendant and Miss Krueger had testified that Zemke had picked it up and Zemke had denied the fact, and the jury would be no better qualified to determine which statement was true by examining it unbroken. So the question of its materiality as evidence doubtless depended on whether it was broken in the affray, for this would tend to prove that the affray was violent, as claimed by the defense. For this reason, doubtless, the court allowed it to go before the jury and be considered by them, if they found that such was the fact. In these rulings we are unable to see that there was any error.

Zemke testified that he had not been with Tomlinson during the afternoon preceding the tragedy. On the other hand, the defense claimed that Tomlinson and Zemke were together during the greater part of the day, and called several witnesses who testified to having seen them together at about 4 o'clock in the afternoon near the Schlitz building on Third street. They then called one Simpson, who testified

to seeing Tomlinson near the Schlitz building at about 4 p. m. and that a man was with him whom he did not know and could not identify. The state moved to strike out the testimony, and the court said: "He didn't really give any." At the opening of court on the following day the court said to the jury, after referring to this remark:

"That, perhaps, was not well expressed. The court intended to say that he had testified merely to the fact that the deceased was at the brewery, not intimating that the testimony was not credible or that it was not entitled to weight, intending to express no opinion on that subject. The gentlemen of the jury will remember it. I intended to express no opinion as to the effects of that evidence, but merely to state that the witness testified that the deceased was at the brewery and somebody was with him. You remember that in connection with that testimony."

We can see no prejudice in this matter. Of course, the only material fact was that Tomlinson and Zemke were together. The witness did not and could not testify to this fact. His testimony was at most of very slight probative force, and the careful explanation by the trial judge of his first incautious remark must certainly be considered as removing any prejudicial error, even if it be conceded that there was ground for complaint before the explanation was made.

2. The defense claimed that Zemke had been drinking considerably on the day of the homicide and was under the influence of liquor at the time, and introduced witnesses tending to show that he had taken a number of drinks during the day. It appeared that Zemke called at the Emergency Hospital about an hour and a half after the homicide, and the defense called Dr. Donahoe, one of the physicians at the hospital, and attempted to prove by him that Zemke was intoxicated at the time of the call. The testimony was excluded and rightly so. It was entirely competent to prove that Zemke was intoxicated at the time of the transaction,

because that fact would tend to throw doubt upon the accuracy of his observation of events and thus in a measure discredit his testimony; but to prove that he was intoxicated an hour and a half later would have no such tendency and would be strictly immaterial. *Mace v. Reed,* 89 Wis. 440, 62 N. W. 186.

3. There was testimony on the part of the state tending to show that there were no powder marks on the body of deceased. On the other hand, the testimony of the defendant tended to show that when the fatal shot was fired the bodies of defendant and Tomlinson were in close proximity, and the muzzle of the pistol could not have been more than a few inches distant from the vest of Tomlinson. The state on rebuttal offered testimony as to experiments made by shooting bullets from the same pistol, using similar cartridges, through the vest of the deceased at distances of two inches, eight inches, two feet, and four feet; the result of such experiments being that there were powder stains upon the cloth when the pistol was fired at the two lesser distances, but not when fired at the two greater distances. Expert testimony was also admitted tending to show that there would be powder marks on the body had the pistol been discharged at a distance of six inches. All this testimony was objected to as incompetent and not proper rebuttal, but we are unable to agree with this contention. The results of experiments made under conditions which are shown to the trial court to be essentially the same as the conditions existing at the time of the original transaction may properly be admitted in evidence. *Zimmer v. Fox River V. E. R. Co.* 123 Wis. 643, 101 N. W. 1099. The results of the experiments tended to directly contradict the defendant's testimony as to the close proximity of the deceased and thus to discredit the claim of self-defense. The testimony, therefore, was rightly received in rebuttal.

4. It is claimed that the court erred in the charge to the

jury. The court submitted to the jury murder in the first and second degrees and manslaughter in the second and third degrees, and, as before stated, the defendant was convicted of manslaughter in the second degree under sec. 4351, Stats. (1898); that is, he was convicted of unnecessarily killing another while resisting an attempt of such other to commit a felony or other unlawful act. After reading sec. 4351 and instructing the jury as to the necessary elements of an offense under that section, the court said:

"But, gentlemen, if you find from the evidence, beyond a reasonable doubt, that at the time of the homicide the defendant entertained a premeditated design to kill Tomlinson, then such killing would be murder in the first degree, not manslaughter in any degree, unless such killing was justified under the law of self-defense as hereinafter instructed."

The only complaint made is that this instruction was capable of causing the jury to believe that the defendant, though acting in self-defense, might still be guilty of manslaughter in the second degree. We do not think the instruction capable of any such interpretation and hence must overrule the objection.

5. It is finally claimed that the verdict is contrary to the evidence and based upon prejudice, and a strong argument is made upon the facts, based principally upon the inconsistencies and improbabilities of Zemke's story of the homicide as well as the numerous contradictions by other witnesses of more or less material statements made by him. We must admit that had the defendant been convicted of murder in the first degree we should feel hesitancy in sustaining the conviction; but after careful examination of the record we think there was ample evidence to justify the finding that the killing was unnecessary, under sec. 4351, *supra*.

By the Court.—Judgment affirmed.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

May 16—June 5, 1908.

Railroad Commission: Powers: Interference by courts: Constitutional law: Powers of legislature: Delegation: Ascertainment of facts: Regulation of railroad rates or service: Fixing "reasonable" rates, etc.: Review by courts: "Unlawful or unreasonable" orders: "Clear and satisfactory evidence:" Railroad stations: Distance apart: Stopping of trains.

1. The Railroad Commission created by ch. 362, Laws of 1905, was intended by the legislature to be a tribunal of great dignity and responsibility having to deal with vast interests and complicated legal and economic questions, and was given powers appropriate to the discharge of these duties.
2. Unless clearly required to do so the circuit court should not interfere with the determinations or orders of the Railroad Commission.
3. If the orders and rules of the Railroad Commission were wholly legislative in their nature the legislature could not delegate to the Commission power to make such rules and orders.
4. Neither could power be conferred upon courts by mere statute to review and set aside as unreasonable acts of the legislature not in conflict with the state or federal constitution or with some paramount federal law.
5. It is impossible under our system of government to fix and maintain efficiently a system of just and reasonable regulation of railroad rates and service by direct action of the legislature specifying rates and details of service.
6. The authority of the state to exercise the just and ordinary powers usually possessed by governments (among which is the regulation of rates and services of railroad carriers) is not to be restricted by mere implication from the expressed provisions of the state constitution.
7. Without any specific enabling provisions in the constitution the legislature of this state may make all laws necessary and proper for carrying into execution the powers which that instrument vests in the state government or in any department or officer thereof.
8. In the usual process of enacting a law there is frequently necessary the preliminary determination of a fact or group of facts by the legislature.

9. The legislature may delegate such power not legislative in its nature as it has itself authority to exercise.
10. The legislature may create a *quasi*-judicial tribunal and delegate to that tribunal the power which the legislature possesses to ascertain, determine, and declare, facts, whether such determination precedes or follows the enactment of the general legal rule.
11. In a case in which its power of regulation cannot otherwise be justly or efficiently exercised the legislature has power to declare a general rule of law applicable to conditions of fact described by that law in general terms but not precisely ascertained, such law to take effect upon all specific cases within that general rule only when the existence of such conditions of fact is ascertained and established by subsequent determination of a judicial or *quasi*-judicial tribunal.
12. Likewise a general rule of law may be enacted to take effect and be in force upon the subsequent establishment of certain facts or conditions; and the nature of the contingency in which the law is to go into effect is not material if such contingency be fairly connected with the object and purposes of the statute and reasonably certain.
13. A statute declaring that railroad rates and service shall be reasonable, creating a commission with power to investigate existing rates and service and to fix and determine what rates and what service are reasonable, and providing that the rates and service so fixed shall be in force, is a valid exercise of the legislative power.
14. The legislature may in such case, instead of making the law wholly conditional and contingent upon the ascertainment and declaration of reasonable rates or service by the commission, add the further contingency that the order of the commission fixing the rate or service be subject to review by the courts and upheld by the courts as not unreasonable.
15. Neither the commission nor the courts can, however, be vested with discretion to determine whether the precedent law shall or shall not go into effect in particular cases.
16. Ch. 362, Laws of 1905, assumes and declares the existence of a railroad rate, charge, classification, or service which is exactly reasonable and just, applicable to every special instance or condition, and discoverable by investigation, and commits to the Railroad Commission the duty to ascertain and disclose that rate, classification, or service, and when so ascertained and disclosed the mandate of the statute that rates, fares, charges, classifications, and joint rates fixed by the Commission shall be in force and *prima facie* reasonable, declares an ancillary

rule of law to take effect in the particular instances investigated by the Commission, contingent upon the ascertainment and promulgation by the Commission of what is reasonable in the particular instance or under the particular conditions under investigation. The Commission is not given power or discretion to fix one of several rates either of which would be just and reasonable, and hence there is no delegation of purely legislative power.

17. The function of the courts, under said ch. 362, Laws of 1905, in reviewing an order of the Railroad Commission is not to determine whether the rate or service fixed by it is just and reasonable, but to determine whether the *order* is unreasonable or unlawful. If the order is found by the court to be such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable.

18. In such review the courts are required to exercise no legislative power, to ascertain and disclose no rates, to declare no rule or law unreasonable, but merely to exercise judicial power in determining whether or not the order of the Commission was unreasonable and to set it aside if so found, leaving the Commission free to make further investigation and take further action; and the conferring of such authority upon the courts is within the legislative power.

19. In the provision in sec. 16, ch. 362, Laws of 1905, that in an action to set aside an order of the Railroad Commission the burden of proof is upon the plaintiff to show by clear and satisfactory evidence that the order is unlawful or unreasonable, the words "clear and satisfactory" are intended to describe a degree of proof greater than a preponderance of evidence and such as is necessary to establish fraud or prove mistake in a written instrument.

20. Considering the degree of proof required in such an action, the viewpoint of the investigation by the court, and that the court is dealing with a question of fact or a mixed question of fact and law, great weight will necessarily be given to the order of the Commission and a very strong case must be made to establish its unreasonableness.

21. An order of the Commission need not be confiscatory in its character and effect in order to be unlawful or unreasonable within the meaning of the statute.

22. What distinction there is between the terms "unreasonable" and "unlawful" as used in the statute, is not here determined.

23. In this case an order of the Railroad Commission requiring the erection of a platform and the stopping of certain local passenger trains at a point about midway between stations 7.8 miles apart, is *held* not to have been shown to be unreasonable, al-

though this court would not have made the order had it been sitting as a commission.

MARSHALL and BASHFORD, JJ., concurring in the decision, are of the opinion:

1. In every hearing before the Railroad Commission on complaint the initial and jurisdictional question is whether, in the given case, the conduct of the railroad company is unreasonable; and such jurisdictional fact should be shown affirmatively to have been found.

2. The reasonable service or rate which the Commission is empowered to fix and order substituted for the service or rate complained of is in each case the minimum service or the maximum rate which is reasonable.

3. A full judicial review of the action of the Commission is contemplated, the circuit court to try questions of law and fact the same as the Commission, giving such weight, however, to the decision of the latter on all matters of fact that it shall stand unless shown to be wrong by clear and satisfactory evidence; and, in case of an appeal to the supreme court, the scope of review to be the same as in case of any appeal from a judgment in an action tried by the court.

DODGE, J., dissenting from the decision on the ground that the service in question, rendered by the railroad company at the time of the complaint to the Commission, was not shown to have been other than reasonably adequate, is of the opinion:

1. The Commission is empowered first to determine whether a rate or service complained of is unreasonable, and not until or unless that fact is established is any further action by the Commission authorized.

2. After finding that the rate or service complained of is unreasonable, it becomes the duty of the Commission to ascertain and declare *the* reasonable rate or service, which is the maximum rate or minimum service consistent with reason.

3. The selection and fixing of any other than such maximum rate or minimum service would necessarily involve, not merely the ascertainment of a fact or condition, but also the exercise of choice or discretion based on considerations of policy or expediency. The power to exercise such choice is purely legislative and cannot be delegated.

4. In reviewing an order of the Commission requiring certain service from a railroad company the court must assume that the Commission thereby fixed the minimum service which in its opinion would be reasonable, and if the court finds, after consideration of the evidence, giving due weight to the decision of the Commission, that a less service would be within the field of reason, the order should be held unlawful because an erroneous decision of a concrete question of fact.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The cause was argued and submitted on February 3, 1908.

For the appellant there was a brief by *Alfred H. Bright,* and a reply brief by *Sanborn & Blake,* attorneys, and *Alfred H. Bright,* of counsel, and oral argument by *Mr. Bright* and *Mr. J. B. Sanborn.*

For the respondent there was a brief by the *Attorney General* and *A. C. Titus,* first assistant attorney general, and oral argument by *Russell Jackson,* deputy attorney general.

On March 10, 1908, the following *per curiam* order was made:

"Ordered, that this cause be placed at the foot of the assignment of cases for April 21, 1908, and be reargued upon the following questions:

"(1) What is the scope of review by the courts of the orders of the Railroad Commission of Wisconsin contemplated in the action provided for by sec. 16, ch. 362, Laws of 1905?

"(2) Is it within the legislative power to confer upon courts authority to review the reasonableness of rules or orders of the Railroad Commission?

"(3) What is the true construction of the word 'unreasonable' in said section?

"Ordered, further, that the clerk of this court transmit a copy of this order to the attorney general and to each of the resident counsel of the principal lines of railroad, who are hereby invited to participate in said reargument and to serve and file briefs."

Pursuant to such order the cause was reargued on May 16, 1908.

John B. Sanborn, attorney, and *A. H. Bright,* of counsel, for the appellant, cited sec. 1801, Stats. (1898); *Railroad Comm'rs v. Missouri Pacific R. Co.* 71 Kan. 193, 80 Pac. 53; *Morgan's La. & T. R. & S. S. Co. v. Railroad Comm.* 109 La. 247, 33 South. 214; *Railroad Comm. v. K. C. S.*

R. Co. 111 La. 133, 35 South. 487; *State ex rel. Railroad & W. Comm'rs v. M. & St. L. R. Co.* 76 Minn. 469, 79 N. W. 510; *State ex rel. Railroad & W. Comm'rs v. N. P. R. Co.* 90 Minn. 277, 96 N. W. 81; *State v. N. P. R. Co.* 89 Minn. 367, 95 N. W. 297; *Miss. R. R. Comm. v. Ill. Cent. R. Co.* 203 U. S. 335, 27 Sup. Ct. 90; *Railroad Comm. Cases,* 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191; *Dow v. Beidelman,* 125 U. S. 680, 8 Sup. Ct. 1028; *St. Louis & S. F. R. Co. v. Gill,* 156 U. S. 649, 15 Sup. Ct. 484; *Louisville & N. R. Co. v. Kentucky,* 183 U. S. 503, 22 Sup. Ct. 95; *Minneapolis & St. L. R. Co. v. Minnesota,* 186 U. S. 257, 22 Sup. Ct. 900; *Budd v. New York,* 143 U. S. 517, 12 Sup. Ct. 468; *Chicago & G. T. R. Co. v. Wellman,* 143 U. S. 339, 12 Sup. Ct. 400; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362, 14 Sup. Ct. 1047; *Smyth v. Ames,* 169 U. S. 466, 18 Sup. Ct. 418; *Pennsylvania R. Co. v. Philadelphia Co.* 220 Pa. St. 100, 68 Atl. 676; *Chicago, B. & Q. R. Co. v. Jones,* 149 Ill. 361, 37 N. E. 247; *Burlington, C. R. & N. R. Co. v. Dey,* 82 Iowa, 312, 48 N. W. 98; *Chicago & N. W. R. Co. v. Dey,* 35 Fed. 866; *State v. D. M. & K. C. R. Co.* 87 Iowa, 644, 54 N. W. 461; *Storrs v. P. & A. R. Co.* 29 Fla. 617, 11 South. 226; *State v. Ala. & V. R. Co.* 68 Miss. 653, 9 South. 469; *People ex rel. Loughran v. Railroad Comm'rs,* 158 N. Y. 421, 53 N. E. 163; *People ex rel. Steward v. Railroad Comm'rs,* 160 N. Y. 202, 54 N. E. 697; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Comm.* 162 U. S. 184, 16 Sup. Ct. 700; *Texas & P. R. Co. v. Interstate Commerce Comm.* 162 U. S. 197, 16 Sup. Ct. 666; *Interstate Commerce Comm. v. Ala. M. R. Co.* 168 U. S. 144, 18 Sup. Ct. 45; *Interstate Commerce Comm. v. C. G. W. R. Co.* 141 Fed. 1003; *Steenerson v. G. N. R. Co.* 60 Minn. 461, 62 N. W. 826; *Jacobson v. Wis., M. & P. R. Co.* 71 Minn. 519, 74 N. W. 893; *State ex rel. Railroad & W. Comm. v. W. & S. F. R. Co.* 88 Minn. 448, 93 N. W. 112; *State ex rel. Railroad & W. Comm'rs v. M. & St. L. R. Co.*

76 Minn. 469, 79 N. W. 510; *Chicago, I. & L. R. Co. v. Railroad Comm.* 38 Ind. App. 439, 78 N. E. 338; *Railroad Comm. v. H. & T. C. R. Co.* 90 Tex. 340, 38 S. W. 750; *Railroad Comm. v. Weld,* 96 Tex. 394, 73 S. W. 529; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. E. 738; *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347; *Madison v. Madison G. & E. Co.* 129 Wis. 249, 268, 108 N. W. 65; *Atl. C. L. R. Co. v. N. C. Corp. Comm.* 206 U. S. 1, 27 Sup. Ct. 585; *Ill. Cent. R. Co. v. Interstate Commerce Comm.* 206 U. S. 441, 27 Sup. Ct. 700; *Plott v. C. & N. W. R. Co.* 63 Wis. 511, 23 N. W. 412; *Chicago & N. W. R. Co. v. State ex rel. Carr,* 74 Neb. 77, 103 N. W. 1087; *Northern Pac. R. Co. v. Terr. ex rel. Dustin,* 142 U. S. 492, 12 Sup. Ct. 283; *In re Griner,* 16 Wis. 423; *State ex rel. Moreland v. Whitford,* 54 Wis. 150, 11 N. W. 424; *Nash v. Fries,* 129 Wis. 120, 108 N. W. 210; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *In re Linden,* 112 Wis. 523, 88 N. W. 645; *State ex rel. Boycott v. Mayor,* 107 Wis. 654, 84 N. W. 242; *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Le Feber v. West Allis,* 119 Wis. 608, 97 N. W. 203; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 98 N. W. 969; *State v. Houser,* 122 Wis. 534, 100 N. W. 964; *Interstate Commerce Comm. v. C. G. W. R. Co.* 209 U. S. 108, 28 Sup. Ct. 493; *Platt v. Lecocq,* 158 Fed. 723.

For the respondent there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and *Olin & Butler,* of counsel, and oral argument by the *Attorney General* and *H. L. Butler.*

The respondent, in addition to many of the above cases, cited *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475; *Trustees v. Saratoga G., E. L. & P. Co.* 191 N. Y. 123, 83 N. E. 693; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376; *Granger Cases,* 94 U. S.

155–181; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048; *U. S. ex rel. Riverside Oil Co. v. Hitchcock,* 190 U. S. 316, 23 Sup. Ct. 689; *Bates & Guild Co. v. Payne,* 194 U. S. 106, 24 Sup. Ct. 595; *San Diego L. & T. Co. v. National City,* 174 U. S. 739, 19 Sup. Ct. 804; *San Diego L. & T. Co. v. Jasper,* 189 U. S. 439, 23 Sup. Ct. 571; *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S. 418, 10 Sup. Ct. 462; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Comm.* 162 U. S. 184, 16 Sup. Ct. 700; *Texas & Pac. R. Co. v. Abilene C. O. Co.* 204 U. S. 426, 27 Sup. Ct. 350; *Steenerson v. G. N. R. Co.* 69 Minn. 353, 72 N. W. 713; *In re Auburn & W. R. Co.* 37 App. Div. 162, 55 N. Y. Supp. 895; *People ex rel. Terminal R. Co. v. Railroad Comm'rs,* 53 App. Div. 61, 65 N. Y. Supp. 597; *Cedar Rapids W. Co. v. Cedar Rapids,* 118 Iowa, 234, 91 N. W. 1081; *Atlantic Coast Line v. Wharton,* 207 U. S. 328, 28 Sup. Ct. 121; and other cases.

In response to the invitation of the court there were briefs by *Edward M. Hyzer, C. H. Van Alstine,* and *Miller, Mack & Fairchild,* and oral argument by *Mr. Hyzer* and *Mr. Van Alstine.*

TIMLIN, J. On September 15, 1906, the Railroad Commission of Wisconsin, upon complaint made by and in behalf of a number of persons residing in the town of Garfield, Polk county, and after hearing said complainants and the railway company, made an order that the *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* erect and construct at a point on its line between the stations of Nye and Deronda, which point was formerly known as Dwight's Siding or Spur, a platform suitable for the loading and unloading of cream and other merchandise shipped by express; that such platform should be constructed so as to be accessible to

teams, and of the kind and dimensions usually and customarily furnished at small stations where no depot is maintained, and should be sufficient to enable passengers to get on and off trains with safety. The railway company was further ordered to stop its local passenger trains numbered 84 and 85, as shown on its time-card of August 10, 1906, at the point above designated for the purpose of receiving and discharging passengers and express packages. Except in the season during which cream is shipped, the trains are required to stop only upon signal or request by prospective or actual passengers. According to appellant's time-card of August 10, 1906, Nye is 61.8 miles and Deronda 69.6 miles eastwardly from Minneapolis, and each about ten miles nearer to St. Paul. Local passenger train No. 84, east bound, arrives at Nye at 10:54 a. m. and at Deronda at 11:10 a. m., daily except Sunday. Local passenger train No. 85, west bound, arrives at Deronda at 2:47 p. m. and at Nye at 3:06 p. m., daily except Sunday. Nye and Deronda are 7.8 miles apart. The new stopping place, called Dwight, is about midway between the stations and in or about the center of an agricultural and dairying community consisting of sixty-four families of 294 persons, and this area, two by three miles in extent, is naturally tributary to Dwight for railroad purposes. The probable contribution to railroad traffic from Dwight will be six cans of cream daily in summer and three cans three times a week in winter, together with some shipments of butter and eggs and an occasional passenger, all of which would at current rates pay the railroad company a small profit over and above the expense caused by this extra stop at Dwight. There are five flag stations in the first 114 miles eastwardly from Minneapolis at which trains numbered 84 and 85 stop. These trains carry no freight, but do carry express packages in a sort of combination car. The railway company formerly maintained a spur at Dwight. The order does not prevent the trains numbered 84 and 85 from making their ordinary and

usual connections, and the stop is attended with no danger on account of the proximity of the trains in question to other trains on the same road at that hour. There is a good road from Dwight to Deronda, where there is a small village or hamlet. At Dwight there is a general store, a church, and a schoolhouse. There are other evidential matters, but the foregoing are the principal facts.

The railway company brought an action under sec. 16, ch. 362, Laws of 1905, in the circuit court for Dane county against the Railroad Commission to vacate and set aside the order in question, and after trial and hearing the circuit court made findings of fact and conclusions of law to the effect that the order of the Commission was not unreasonable, and rendered judgment refusing to vacate this order. This court is asked to review and reverse on its merits the judgment of the circuit court. After the case was presented to this court upon briefs and arguments on January 28, 1908, a reargument was ordered. The following questions, but in different order, were suggested for reargument:

(1) Is it within the legislative power to confer upon courts authority to review the reasonableness of rules or orders of the Railroad Commission?

(2) What is the scope of review by courts of the orders of the Railroad Commission of Wisconsin contemplated in the action provided for by sec. 16, ch. 362, Laws of 1905?

(3) What is the true construction of the word "unreasonable" in that section?

The able counsel who presented the case on the first argument have been assisted upon the reargument by other able and distinguished members of the bar, and we gratefully acknowledge that the thorough presentation of the questions involved from varying viewpoints and with much legal learning and acumen has been of great service to this court. We have also given the subject painstaking investigation and careful consideration.

Ch. 362, Laws of 1905, is the first attempt in this state to

regulate the rates and service of railroads by or through a commission, although much experimental legislation of this kind has come into existence by the enactment of federal statutes and by the enactment of statutes and the adoption and amendment of constitutions in many of the states during the last twenty-one years. The exact legal relation of the railroad to the state and its citizens presents many grave and difficult legal problems. It was unknown to the ancient jurists. Restrictions of written constitutions and of our dual system of federal and state control of commerce, the vastness of the interests affected, the multitude of detail, and the many-sided legal and economic nature of the questions ordinarily presented, are responsible for much of this difficulty; the extraordinary development of the carrying trade in modern times for more. Consequently the law on this subject, statute and unwritten, is more or less in a state of transition at the present time.

After creating the Commission, to consist of three persons, one of whom shall have a general knowledge of railroad law and the others a general understanding of matters relating to railroad transportation, it is provided that such officers shall be and remain disinterested upon pain of forfeiture of office, and that no member of the Commission shall hold any other office or any position of profit or pursue any other business, but shall devote his whole time to the duties of his office. These qualifications required for the office and these safeguards to insure the impartial exercise of its functions and the great power vested in the Commission by this act and by later statutes evince an intention of the legislature to create an office of great dignity and great responsibility. The Commission has the charge and determination of interests vast in amount, delicate and complicated in their legal and economic relations, affecting the happiness and prosperity of all the people of the state, and involving the consideration and protection of private rights of the most sacred

character. Experience tends to show that public officers, as well as private citizens, are apt to rise in character and dignity to meet great responsibilities, but to shift responsibility where opportunity of shifting is easily afforded and thereby to deteriorate in efficiency and in character. Besides this, the work of the Commission requires much expert knowledge of the difficult subject of transportation and rates, the consideration and application of economic as well as legal principles, and an intimacy with local and state traffic conditions. Consequently, unless required to do so by the mandate of law, the circuit courts should interfere as little as they may with the determinations and the work of the Railroad Commission. But courts, too, are bounden to duty, and cannot throw off at will that which is imposed upon them by law fairly construed and properly understood.

The statute in question defines the term "railroad" as used therein, and provides that every railroad is required to furnish reasonably adequate service and facilities, and that the charges made for any service rendered or to be rendered in the transportation of passengers or property, or for any service in connection therewith, or for the receiving, switching, delivering, storing, or handling of such property, shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful. In the absence of any action by the Railroad Commission the railroad may fix rates, but not above the maximum therein provided. Upon complaint of any person or on its own initiative the Railroad Commission may proceed to hear and investigate, and if it be found that the rate or rates, fares, charges, or classifications, or any joint rate, or any regulation, practice, or service, be unreasonable, or unjustly discriminatory, or the service be found inadequate, the Railroad Commission shall have power to fix and order substituted therefor such rate or rates, fares, charges, or classifications as it shall have determined to be just and reason-

able, which shall be charged, imposed, and followed in the future, and shall also have power to make such orders respecting such regulation, practice, or service as it shall have determined to be reasonable, which shall be observed and followed in the future (secs. 12 and 14). All rates, fares, charges, classifications, and joint rates fixed by the Commission shall be in force and shall be *prima facie* reasonable until finally found otherwise as therein provided. Sec. 16 of the act in question permits the railroad or any other party in interest to obtain a review of the orders of the Commission by bringing an action in the proper circuit court against the Commission to vacate and set aside its order on the ground that the rate or rates, fares, charges, classification, or joint rates fixed by such order are unlawful, or that any regulation, practice, or service fixed by such order is unreasonable. This action is to be tried and determined like other civil actions, except that, if new evidence is introduced at such trial, the circuit court, unless the parties stipulate otherwise, must remand the cause back to the Railroad Commission for further action. Either party may appeal from the judgment of the circuit court to the supreme court. The act also provides:

"In all trials under this section the burden of proof shall be upon the plaintiff to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be."

Other provisions of the act need not be noticed here, except to say that the Commission is given power by subd. "a" of sec. 14, after hearing, to rescind, alter, or amend any of its orders, and by sec. 28 to fix emergency rates and suspend existing rates.

Whether it is within the power of the legislature to confer upon courts authority to review the reasonableness of rules or orders of the Railroad Commission depends upon the fun-

damental nature of these rules or orders. If such rules and orders are purely legislative and violate no constitutional law or paramount federal statute, it would be incorrect to say that their reasonableness could be the subject of judicial review, because that would give the judicial branch of government a supervisory control over legislation, largely discretionary, and limited only by the judicial opinion of what is reasonable. It is argued that the power to fix rates is a legislative power, and can never be anything else whether the rates are fixed by the legislature or by a commission or by the action of the legislature and commission jointly; that the legislative power is by the constitution vested in the senate and assembly, and cannot be delegated except in instances expressly provided for in the constitution. But when we add to this that because of the multitude of detail, the intricacy of the subject, the expert knowledge required, the numerous separate investigations of interrelated questions of fact which are necessary, and the necessity for frequent changes and adjustments in rates or service, a legislative body, the members of which are chosen for short terms from the body of the people, would find it an actual rather than a legal impossibility to fix just and reasonable rates, it becomes apparent that this position tends to the conclusion that by the adoption of its constitution, which vested the whole legislative power in the senate and assembly and forbade its delegation, the state was shorn of some of its usual and necessary powers of sovereignty and became impotent to exercise the power of regulation. Rate regulation of railroads by direct action of the legislature has been tried and found impracticable and its attempt generally abandoned. The business of the carrier has in these modern times so grown and expanded and become such a large factor in the complicated social and economic life of the country that the old modes of regulation by direct action of the legislative body are no

longer adequate and, indeed, no longer possible. But the old authority and the old principles remain and are not to be abrogated by implication.

It was said in *Railroad Co. v. Peniston,* 18 Wall. 5, 31, speaking of the federal constitution: "Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary power of the states or prevent their efficient exercise." Much less should those state officials upon whom rests the duty of interpreting the state constitution derive from the words of that constitution implications which impair the authority of the state to exercise the just and ordinary powers usually possessed by governments, and which implications would recognize within the state persons or corporations not subject to or capable of ordinary regulation by the state, and presuppose that by the adoption of the constitution the state so manacled itself as to be helpless to exercise old and well-known governmental powers or to apply such powers to new problems or new conditions. Such construction would make the mere implications of the constitution greater than the constitution itself, and would lose sight of the main and paramount purpose of the creation of the state and the adoption of its constitution. A constitution so construed would last only so long as it took to bring about an amendment or a new constitution, made possibly in the heat of conflict, and therefore in all probability less wise and equitable than the old constitution properly construed. This is called by counsel the doctrine of expediency, but we think it the doctrine of common sense that forbids implications from an instrument which tend to render nugatory or to destroy that instrument.

The constitution of the United States gives Congress power to make all laws necessary and proper for carrying into execution the powers by that instrument vested in the government of the United States or in any department or officer thereof. The legislature of the state of Wisconsin

needs no such enabling provision. It possesses that power. But it was said in *Boske v. Comingore,* 177 U. S. 459, 468, 20 Sup. Ct. 705:

"Congress has a large discretion as to the means to be employed in the execution of a power conferred upon it, and is not restricted to 'those alone without which the power would be nugatory;' for 'all means which are appropriate, which are plainly adapted' to the end authorized to be attained, 'which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' 'Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.' *McCulloch v. Maryland,* 4 Wheat. 316, 415, 421, 423. In the more recent case of *Logan v. U. S.* 144 U. S. 263, 283, 293, 12 Sup. Ct. 622, 626, this court, referring to the above constitutional provision, said that, 'in the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and spirit of the constitution.' Again: 'Every right created by, arising under, or dependent upon the constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative power conferred upon it by the constitution, may in its discretion deem most eligible and best adapted to attain the object.'"

So statutes declaring that railroad rates and service shall be reasonable, and creating a commission with power to investigate existing rates and service, and to fix and determine what rates and what service are reasonable, the statute then providing that the rates and service so fixed shall be in force, have been generally upheld as a valid exercise of the legislative power. *Railroad Comm. Cases,* 116 U. S. 307, 6 Sup. Ct. 334, 338, 1191; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362, 14 Sup. Ct. 1047; *Georgia R. Co. v. Smith,*

70 Ga. 694; *Chicago, B. & Q. R. Co. v. Jones,* 149 Ill. 361, 37 N. E. 247; *Hopper v. Chicago, M. & St. P. R. Co.* 91 Iowa, 639, 60 N. W. 487; *State ex rel. Railroad & W. Comm. v. M. & St. L. R. Co.* 80 Minn. 191, 83 N. W. 60; *Railroad Comm. v. H. & T. C. R. Co.* 90 Tex. 340, 38 S. W. 750. The division of governmental powers into executive, legislative, and judicial, while of great importance in the creation or organization of a state and from the viewpoint of institutional law and otherwise, is not an exact classification. No such exact delimitation of governmental powers is possible. In the process of enacting a law there is frequently necessary the preliminary determination of a fact or group of facts by the legislature, and it is well settled that the legislature may declare the general rule of law to be in force and take effect upon the subsequent establishment of the facts necessary to make it operative or to call for its application; as the bankruptcy law of the United States with reference to legislative action regarding exemption laws existing or to be thereafter enacted (*Hanover Nat. Bank v. Moyses,* 186 U. S. 181, 22 Sup. Ct. 857); or the law may be made to take effect conditionally, depending upon the action of the legislature of another state fixing the amount to be exacted (*Phœnix Ins. Co. v. Welch,* 29 Kan. 672; sec. 1221, Stats. 1898, and cases in note); or it may be conditioned upon the legislative act of a city council (*Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869); or upon action of the executive (*In re Griner,* 16 Wis. 423; *Field v. Clark,* 143 U. S. 649, 12 Sup. Ct. 495); or upon judicial action involving the determination of questions of fact (*In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033, and cases cited in opinion; *Nash v. Fries,* 129 Wis. 120, 108 N. W. 210); or upon administrative action (*State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347, and cases cited in opinion); or upon a declaration of fact or the creation of a condition by vote of the electors of a municipality (*State ex rel. Faber v. Hinkel,* 131

Wis. 103, 111 N. W. 217). In short, as said by REDFIELD, C. J., in *State v. Parker,* 26 Vt. 357:

"It makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and a legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one."

The legislature may delegate any power not legislative which it may itself rightfully exercise. *Wayman v. Southard,* 10 Wheat. 1. This power to ascertain facts is such a power as may be delegated.

The cases heretofore cited with reference to the constitutionality of laws creating a railroad board or commission and authorizing the latter to ascertain and fix reasonable rates, which rates, thus ascertained, would be thenceforth in force, rest on these rules of law. Consequently there can be no objection if the legislature, instead of making the law wholly conditional and contingent upon the ascertainment and declaration of reasonable rates by the commission, add the further contingency that the investigation and order of the commission be subject to review by the courts, and the rates so fixed by the commission upheld as not unreasonable by judicial determination. But neither the commission nor the court can be vested with discretion to determine whether the precedent law declared by the legislature shall or shall not go into effect in particular cases. *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738. This law (ch. 362, Laws of 1905) establishes, and thenceforth assumes, the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the Railroad Commission the duty to ascertain and disclose that particular rate, charge, classification, or service. The law intends that there is only one rate, charge, or service that is reasonable and just. When

the order of the Commission is set aside by the court it is because this reasonable and just rate, charge, classification, or service has not yet been correctly ascertained. When the order of the Commission has been rescinded or changed by the Commission because of changed conditions it is because there is a new reasonable rate to be ascertained and disclosed applicable to such new conditions and fixed by force of law immediately when the new conditions come into existence. But the theory and the mandate of the law is that this point always exists under any combination of conditions and is always discoverable although not always discovered. Until it is discovered and made known the former rates and service prevail. The order of the Commission is *prima facie* evidence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force. If it were conceded that the Commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power to the Commission. But the theory of this law is to delegate to the Commission the power to ascertain facts and to make mere administrative regulations.

If this court or the circuit court were by the statute in question authorized to investigate the subject anew, to put itself in the place of the Commission and search for this reasonable and just rate, with power to substitute its own judgment of what is reasonable and just for the judgment of the commissioners, the statute might be subject to grave criticism. But the courts are not by this statute so authorized. The authority given to the circuit court is not to search for or disclose or declare this "reasonable and just" rate or service, but merely to determine whether the order of the Commission is "unreasonable"—quite a different thing. We think the legislature was within its power in conferring upon

the courts such authority to inquire whether or not the order of the Commission was unreasonable and to vacate the order if so found. In doing so the courts are required to exercise no legislative power, to ascertain and disclose no rates, to declare *no rule or no law* unreasonable, but merely to exercise judicial power to ascertain and determine whether the Commission has so far failed in its search for this lawful, just, and reasonable rate as to have found instead, and declared, that which is unreasonable. The result of the reversal of the order of the Commission is not to establish this fact or ascertain this point of reasonableness, but to leave it undisclosed, leaving the former rates to stand or requiring the commissioners to try over again to find it. In reviewing the order of the Railroad Commission the inquiry is not whether the rate, regulation, or service fixed by the Commission is just and reasonable, but whether the *order* of the Commission is unreasonable or unlawful. The nature of the inquiry is changed at this point, and the court is not investigating for the purpose of establishing a fixed point. Whether or not the order is within the field of reasonableness, or outside of its boundaries, is the question for the court. It is quite a different question from that which was before the Commission in this respect. The order being found by the court to be such that reasonable men might well differ with respect to its correctness cannot be said to be unreasonable. From this aspect it is within the domain of reason, not outside of its boundaries. This is the viewpoint of the reviewing court. Doubtless the court may, for the purpose of comparison and to aid it in ascertaining how far the order diverges from a reasonable standard, take evidence of and consider such criterion. But this is only for comparison. The court cannot legally adjudicate or declare this statutory standard.

Unless the plaintiff is able to show by clear and satisfactory evidence that the order of the Commission complained

of is unlawful or unreasonable, as the case may be, the order must stand. The words "clear and satisfactory evidence" are significant, because at the time of the enactment of this statute they were used in the law of this state to describe a degree of proof greater than a preponderance of evidence and such as was necessary in order to establish fraud by that party to an action upon whom the burden of proof rested. *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 258, 91 N. W. 666; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Dallman v. Clasen,* 116 Wis. 113, 117, 92 N. W. 565; *Harrigan v. Gilchrist,* 121 Wis. 127, 313, 99 N. W. 909. The same rule obtains when the party to an action seeks to prove mistake in a written instrument. *Parker v. Hull,* 71 Wis. 368, 37 N. W. 351. "Clear, convincing, and satisfactory" was the expression used in *Linde v. Gudden,* 109 Wis. 326, 85 N. W. 323, in an action in which it was sought to deny the execution of a deed duly acknowledged. Like words are used in *St. Louis & S. F. R. Co. v. Gill,* 156 U. S. 649, at page 667 (15 Sup. Ct. 484, at page 491), to describe the degree of proof necessary to overthrow a rate fixed by the legislature. We must hold that in the statute before the court the legislature used the words "clear and satisfactory" in this sense, and intended they should describe that degree of proof necessary to establish fraud or prove mistake in a written instrument. We are not able to uphold the contention of the learned attorney general, made in his first brief, to the effect that this court cannot review the order of the commissioners unless the order is confiscatory in its character and effect, and that unlawful and unreasonable in this statute mean confiscatory, because it seems to us that this statute authorizing a review by the court is valid and imposes upon the court duties which it may not disregard. Indeed, the constitution of the state seems to forbid any other interpretation. Art. VII, sec. 8. This court therefore maintains its right and duty to review the orders of the Commission to

the extent authorized by this statute as here construed. By the construction here given to the law, considering the degree of proof required and the viewpoint of the investigation by the court and that the court is dealing with a question of fact, or a mixed question of fact and law (*Morgan's La. & T. R. & S. S. Co. v. Railroad Comm.* 109 La. 247, 33 South. 214), great weight is necessarily given to the orders of the Commission.

There seems no valid ground of distinction, so far as the instant case is concerned, between unlawful orders and unreasonable orders of the Commission. An unreasonable order is an unlawful order. What significance may be found in the future under different circumstances in the apparently antithetic use of these terms it is not for us to here decide. Confiscatory orders are ordinarily, but not always, unlawful or unreasonable. In order to be fairly termed confiscatory the order must deprive the railroad of a fair return upon the value of its property, not merely reduce former rates or charges. Cases may also arise, no doubt, in which an order may be unreasonable which falls short of being confiscatory or in which the Commission clearly misapplied some rule of law; but in the review of questions of fact it must, under the rules here found, require a very strong case to establish unreasonableness by evidence clear and satisfactory to the circuit court. Like the United States supreme court, we accord to the orders of the Railroad Commission the weight due to the decisions of a tribunal authorized by law and informed by experience. *Ill. Cent. R. Co. v. Interstate Commerce Comm.* 206 U. S. 441, 27 Sup. Ct. 700. But we go further than this, and add the requirement of that particular degree of proof specified in the statute, and we consider the subject matter and scope of the judicial investigation above referred to. We thus leave upon the Railroad Commission the great responsibility which we believe the legislature intended to impose. In determining whether or

not the order of the Commission is unreasonable, it must also be considered that every unnecessary burden imposed upon the railroad impairs its net receipts and diminishes that margin, if there be one, between the amount sufficient to assure a fair return on the value of its property, plus the amount of its fixed charges and operating expenses, and its gross receipts. In this margin the public and the railroad are interested, because it is only when this exists that betterments in construction or improvements in service not imperative or indispensable, or reduction in rates, will ordinarily be voluntarily made by the railroad or can ordinarily be ordered or enforced by the Commission. We are not now speaking of those extreme cases where the public duty must be discharged whatever the financial consequences to the railroad. *Covington & L. T. R. Co. v. Sandford,* 164 U. S. 578, 17 Sup. Ct. 198, and cases in Rose's Notes; 3 Cook, Corp. (4th ed.) §§ 900, 901, and cases in notes. But in ordinary cases to waste this margin is to waste the fund in which the whole public is interested. This should never be done for the benefit of the few as against the interests of many. It is also to be considered that this margin ought not ordinarily to be exhausted or swept away by orders or requirements of the Railroad Commission as fast as accumulated, because human nature or railroad nature is such that no one will long economize on operating or other expenses if his economy only furnishes a larger basis for further exactions. The rights of the public and the rights of the railroad under this new law must be ascertained and developed by the Railroad Commission slowly and laboriously, moving from precedent to precedent as new instances arise, after the manner of the common-law courts. As was said in *Bates v. Relyea,* 23 Wend. 336, 341:

"They [these instances] must, from the nature of our legal system, be the same to the science of law as a convincing series of experiments is to any other branch of inductive philosophy."

Patience on the part of the public and on the part of the carrier, and time, will be necessary. The notion that commissions of this kind should be closely restricted by the courts and that justice in our day can be had only in courts is not conducive to the best results. Justice dwells with us as with the fathers, it is not exclusively the attribute of any office or class, it responds more readily to confidence than to criticism, and there is no reason why the members of the great Railroad Commission of this state should not develop and establish a system of rules and precedents as wise and beneficent within their sphere of action as those established by the early common-law judges. We find the statute well framed to bring this about.

With reference to the order appealed from, were this court sitting as a railroad commission it would not have made the order in question, because, while the order is no doubt of great convenience to the dwellers about Dwight, their interest seems to us to be overbalanced by the larger interest of the general public. But this is far from saying that we find the order to be unreasonable or that it appears to us by clear and satisfactory evidence that the order is unreasonable. Competent and reasonable men might differ with regard to the propriety or with regard to the justice and reasonableness of the order before the court. It neither affects the interests of the general public nor the interests of the railroad to any great extent. It is undoubtedly within the power of the Railroad Commission to make such an order. No errors of law appear to have been committed. We believe the circuit court was right in affirming the order of the Commission, and there is no preponderance of evidence against the findings of that court, giving the order of the Commission there in evidence the force and effect to which it is entitled by statute.

By the Court.—The judgment of the circuit court is affirmed.

MARSHALL, J. (*concurring*). Although, as said by the court, in effect, the Commission may have gone too far, that does not appear with sufficient clearness to warrant disturbing the approving judgment of the circuit court. The Commission evidently considered the matter with great care, fully appreciating that both sides of the controversy were entitled to consideration. I concur in the decision and in all said in the able opinion for the court by Mr. Justice TIMLIN giving the Commission its proper and distinguished dignity in our governmental system. A code definitely established under the law on the high plane suggested will effect the purpose of regulation: that of preventing injustice upon the one side, and of protecting private property rights upon the other.

I write to state, in a few words, views upon some questions discussed by the court, not suggesting, however, that they differ from those voiced in the opinion.

The words "unlawful" and "unreasonable" were not used in the regulation act as synonymous respecting all situations. Just what the scope of each is, as I view the matter, I will not now undertake to say. That may well be left open for future study and definement.

The legislative scheme embodied in the act, as I understand was conceded upon the argument, is not to take control of railroad property and business from the proprietors, but to supervise the same so as to prevent extortion and injustice and secure fairly adequate service. It contemplates, as I think, that so long as a rate for service is not extortionate or service afforded is fairly adequate the proprietors shall not be interfered with. So, in every hearing upon complaint, the initial and jurisdictional question is whether, in the given case, the conduct of the proprietors is unreasonable. It were better, if it is not necessary, that such jurisdictional fact be shown affirmatively to have been found.

Further, it would seem that in case of the Commission dealing with inadequate service it should require such addi-

tional service as to remove the element of injustice, affording, in the whole, the minimum of what is reasonable, leaving proprietors free and opportunity to give additional service. In case of the Commission dealing with extortionate rates for service it should remove the element of injustice by reducing the rates sufficiently to measure the excess, leaving the proprietors free and opportunity to make further reductions.

The boundaries of reason as applied to service or rates encompass a broad field. The law does not contemplate that the Commission shall make a selection within that field. Otherwise it would be subject to condemnation as a delegation of legislative power. While it is true that there is but one reasonable rate or degree of service which it is contemplated the Commission shall seek for and name, I do not think that there is only one such rate or degree in a given case which is reasonable in the general sense. There may be many, but the Commission is confined to one, otherwise it would in selecting the proper one exercise legislative power. So the one degree or rate, so far as the Commission is concerned, considering that it is merely to prevent extortion and injustice and compel the giving of service which is fair, is the minimum service or maximum rate.

I think the law contemplates a full judicial review by the circuit court of the action of the Commission when properly challenged, the court to try questions of law and fact the same as the Commission, giving such weight, however, to the decision of the latter on all matters of fact that it shall stand unless shown to be wrong by clear and satisfactory evidence, and, in case of an appeal to this court, that the scope of review shall be the same as in case of any appeal from a judgment in an action tried by the court.

If the regulation system shall be firmly established along the lines indicated it will be upon a logical basis, which cannot be said of such systems generally. The Commission

which has charge of the matter here, backed by opportunity for support by a broad judicial review, subject to the deference which, as indicated, should be given to its decisions, can soon work out a plain course of administration, giving to our commonwealth a distinguished position in the field of safe, adequate, rational regulation.

BASHFORD, J. I concur in the foregoing opinion of Mr. Justice MARSHALL.

DODGE, J. (*dissenting*). The opinion filed on behalf of the court in this case contains so much with which I heartily concur that I am perforce driven to a statement of certain personal views inconsistent with some parts thereof as I apprehend their meaning.

I approach the construction of this very important legislation with the assumption that its purpose was to confer upon the Commission powers and duties which could be delegated to it by the legislature and that the decisions authorized to be made by the Commission referred to in sec. 16 of the act (Laws of 1905, ch. 362) were such as to be capable of judicial review.

To accomplish the first purpose the delegation must not include any essential and peculiar function of legislation. All such power is confided by the constitution to the immediate representatives of the people, with no permission to pass it over to boards or individuals not so chosen. The very essential and distinguishing characteristic of legislative action is choosing between different policies on grounds of expediency, and, when choice is made, in declaring for the future a rule of conduct embodying that policy. There is nothing essentially legislative in ascertaining the existence of a fact or a condition as a basis for such considerations of policy. That is a mental process, common to all the branches of government, executive and judicial as well as legislative.

Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738; *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *Nash v. Fries,* 129 Wis. 120, 108 N. W. 210; *Field v. Clark,* 143 U. S. 649, 12 Sup. Ct. 495.

Confronting the question of prescribing services to be rendered and rates to be charged by railways, obviously there arise almost innumerable considerations of policy. Should liberal returns on investment be offered to invite construction and resulting development of agriculture or other kinds of business? Should low rates be made on raw products to promote their sale and shipment at high prices, or is it better policy to impose high rates on the raw products to promote their consumption or manufacture into finished articles at or near home? These are the simplest of illustrations of the multitude of complicated questions of general policy to be decided. The choice of policy in the face of such considerations is legislative and we must presume is not intended to be delegated to the Commission, for the constitution forbids.

Primarily, of course, the owner of a railroad, whether individual or corporation, has the right to conduct his business as he chooses, subject, however, to the limitation, both by common law and by statute, that his charges shall be reasonable. *State v. Milwaukee E. R. & L. Co., post,* p. 179, 116 N. W. 900; *Interstate C. Comm. v. C. G. W. R. Co.* 209 U. S. 108, 28 Sup. Ct. 493. The word "reasonable" in this rule of law is used in its ordinary and usual acceptation, such that its antithesis is "unreasonable." Any rate which is not unreasonable is reasonable and permissible, and the question whether any given rate is unreasonable is to be determined by a process exactly similar to that pursued by courts, which, however, may be exercised by any one or by any official. Independently of statutes the courts can ascertain whether or not such rate be unreasonable. *Madison v. Madison G. &*

E. Co. 129 Wis. 249, 108 N. W. 65. Obviously in this mental process the conclusion is reached by ascertaining the highest rate which can be considered reasonable. Only when an existing rate exceeds that is it unreasonable. When this point is fixed, however, there is in the nature of things ordinarily a more or less extended field within which rates may vary below that limit of reasonableness until the point is reached which even the legislature cannot impose because so low as to be noncompensatory, or, in the language of the decisions, confiscatory.

The legislature perhaps has full power to forego consideration or decision whether rates charged by a railroad company are unreasonable and may at once arbitrarily impose such rate as they may think promotive of public good, so long as it does not result in depriving the carrier of compensation for its service. *State v. Redmon,* 134 Wis. 89, 114 N. W. 137. But under present constitutions it cannot delegate that power to a commission or to a court. By the statute now under consideration the legislature empowered the Commission first to ascertain whether a rate selected and charged by the railroad is unreasonable, and this is the same function exactly as might have been committed to the courts, indeed which the courts already have by common law upon their judicial power being invoked in a suit brought by any one injured by the unreasonable rates. *Madison v. Madison G. & E. Co., supra.* It is an entirely proper subject of delegation, for it is the ascertainment of a fact or condition; vastly complicated, it may be, but still ultimately a conclusion of fact. I think it clear that the law does not authorize any further action by the Commission until or unless the fact is established that the railroad has committed a breach of its duty by charging an unreasonable rate or furnishing a not reasonably adequate service. The law evidently contemplates, and to be valid must contemplate, that, when this fact of unreasonableness exists, the Commission shall de-

clare *the* reasonable rate; and right here is my point of divergence from what I understand to be the view expressed in the opinion of the court. I think that the two words—"unreasonable" as applied to the rate charged by the railroad company and "reasonable" as applied to the duty of the Commission to ascertain and declare one—are exactly antithetic expressions, and that the fields relatively described by them are coterminous, namely, the field of unreasonableness of a rate terminates where reasonableness begins and that the function of the Commission is to ascertain this exact line of demarkation. They are not merely to declare that the rate charged by the railroad is unreasonable, but they are to define that rate, excess over which is unreasonable. That, of course, in the matter of rates, means the highest rate consistent with reason. For example, when the three-cent passenger rate in this state was attacked, the duty of the Commission was to proceed to consider, first, whether it was so unreasonable, and, second, how far it transcended that which would be reasonable. Presumably their mental action in fixing a rate at two and one-half cents was in response to this duty, and their order established, by a judicial and not legislative process, that anything in excess of two and one-half cents would be unreasonable. So considered, the statute became effective and declared that two and one-half cents should be charged. But this in no way precluded the distinctly legislative act subsequently performed by the legislature of declaring that public policy required the rate to be two cents, subject only to the right of courts to ascertain whether the lower rate would result in confiscation. Unless this is the duty imposed upon the Commission, their act is in no sense the ascertainment of a fact and cannot be reviewed by a court *de novo*. If the Commission, recognizing and deciding that two and one-half cents would be within the limits of reasonableness, had then determined that from considerations of public policy two cents only should be

charged, they would have done that which no court could review and which the constitution requires shall be done only by the legislature.

Now in this case, in proceeding to review the order of the Commission, I think the court must start with the assumption that they have performed this duty and decided that in their opinion the service required of the railroad company by the order assailed marks the minimum limit of that service which they find to be reasonable, and upon that assumption review of their decision is an entirely judicial function which can legitimately be performed by the courts, and if the court finds, after consideration of all evidence, giving due deference to the perhaps superior expert knowledge of the members of the Commission, that a less service would be within the field of reason, the order should be held unlawful, because an erroneous decision of a concrete question of fact. If, however, we must start with the assumption merely that the Railroad Commission have kept within the field of reasonableness, and in exercise of their judgment upon questions of general policy and expediency have merely selected some point within that field, then the court is given no practical or efficient review of the Commission's real decision; for the court can only inquire, as is said in the opinion, whether the service ordered or the rate fixed is unreasonable in the sense that it is outside the field of reason.

I find in the opinion of the court the following:

"This law establishes, and thenceforth assumes, the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. . . . The law intends that there is only one rate, charge, or service that is reasonable and just. . . . But the theory and mandate of the law is that this point always exists under any combination of conditions, and is always discoverable although not always discovered. Until it is discovered and made known the former rates and service prevail. The order of the Commission is *prima facie* evi-

dence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force."

In this to my mind lurks solecism. If it be a fact, as seems to me unquestionable, that there is no fixed point of reasonableness, that there is almost invariably a broad field wherein any one of several points would be reasonable, the legislature cannot by mandate or *ipse dixit* change that fact. Courts cannot by act of legislature be deprived of their judicial knowledge of those facts which in the course of nature exist. They must take note of the fact that the sun rises in the east, notwithstanding legislative fiat to the contrary and notwithstanding power may in terms be conferred upon some tribunal to establish the opposite. Where, as seems to me undeniable, the existence of any fixed point in this field of reasonableness, other than the two extremes, can be ascertained only by exercise of choice based on policy or expediency, the courts cannot shut their eyes to the fact that a delegation of authority to find and declare that point is a delegation of authority to exercise legislative choice. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738. The court's opinion seems to me to concede that the duty of the Commission in selecting and declaring a specific rate or service involves something more than mere discovery of a fact, for it proceeds to assert the inability of courts to review such act of the Commission. It is there said that the court can only inquire whether the point fixed by the Commission is "within the field of reasonableness," thus implying that more than one such point might have been selected within such field. If the fiat of the legislature can, as said, be effective to create some one definite and fixed rate which is reasonable to exclusion of all others, and that such exact point can be ascertained by processes not legislative, why cannot such fact be ascertained by the court as well as the Commission? If, as said, there is then only one reasonable rate

or service, any variation from that ideal is of course legislatively unreasonable, and the court, if convinced by the proof that the ideal is something different from the Commission's order, obviously must adjudge that order unlawful.

I think, therefore, that this law should be so construed as to indicate to the Commission a duty to find the reasonable rate which is antithetic to the unreasonable one which the law condemns, and that point of reasonableness is the maximum rate or minimum service consistent with reason. So construed and conscientiously applied, I fully agree in the constitutionality of the law and in the hope of high value to the public of the services of an able and expert commission. If that be the construction, I find no longer any difficulty with the purpose of protection against injustice to the railroad companies afforded by a judicial review *de novo* of the very fact which the Commission finds and decides. This construction recognizes the reserved right in the legislature, performing its constitutional duty, to impose other rates than this maximum reasonable one, and preserves to the people and to the railroad companies the assurance that the resolution of questions of expediency and public policy shall rest with the representatives of the people responsible directly to them at the ballot box.

My dissent from the judgment announced is upon the ground that I cannot convince myself that the service rendered by the railroad company at the time of the complaint to the Commission was other than reasonably adequate. I deem this a jurisdictional fact essential under the statute to the Commission's authority to prescribe any service or rate. *Interstate Commerce Comm. v. C. G. W. R. Co.* 209 U. S. 108, 28 Sup. Ct. 493. Neither the Commission nor the court below has made any finding upon that subject. Since my view cannot prevail in the case, I deem it wholly unnecessary to discuss the evidence and considerations bearing upon the reasonable adequacy of that service.

STATE, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY and others, imp., Appellants.

May 18—June 5, 1908.

Corporations: Reclaiming misapplied assets: Removal of officers: Action by whom brought: "Real party in interest:" State and attorney general: Annulling franchise granted by void ordinance: Street railway companies: Examination of adverse party, when not allowed.

1. Sec. 3239, Stats. (1898), does not conflict with sec. 2605 (requiring every action to be prosecuted in the name of the real party in interest), but merely declares that the action for the relief mentioned shall be entertained by the court when brought by any plaintiff therein described if he is the real party in interest.
2. The state is not "the real party in interest" so as to entitle it, or the attorney general in its name, under sec. 3239, Stats. (1898), to maintain an action to reclaim misapplied assets of a private corporation. The right of action in such case is primarily in the corporation itself and can be exercised only by it, except in those cases where a stockholder or a creditor may apply to a court of equity for protection, in the case of charitable or eleemosynary, and perhaps municipal, corporations, and possibly in a case where a corporation charged with a duty to the public might by dissipation of its assets or property disable itself from performing that public duty.
3. The cause of action for the suspension or removal of recreant officers of a private business corporation is primarily in the corporation itself, and the state has no legal interest in the question such as would authorize it, under sec. 3239, Stats. (1898), to maintain an action for that purpose.
4. [Whether it would be competent for the legislature to declare a public policy that the state, by reason of its interest in the taxability of the corporate assets or to regulate a corporation's charges with relation to its real investment or the like, should have a right to institute suit to enforce the primary right of the corporation to reclaim misapplied assets or remove unsuitable or misbehaving officers, is not determined.]
5. In respect to the commencement of actions there is a distinction between the power of the state and the power of the attorney general. The latter can bring and maintain an action *ex officio* and *sua sponte* only when and in the manner authorized by statute.

6. There is no statute in this state authorizing the attorney general to institute an action to restrain a street railway company from exercising any rights under, and to set aside and annul, a franchise granted to it either by the state or through the medium of a city council. Such an action, if it can be maintained at all, must be brought by the state.

[7. Whether an action in equity can be maintained, even by the state, to restrain the unlawful exercise of franchises ostensibly granted by a void ordinance, or whether the action must be in the nature of *quo warranto*, is not determined.]

8. Where it is apparent that there is no proper judicial proceeding in aid of which the court is entitled to the information to be obtained by an examination of parties under sec. 4096, Stats. (1898), such examination should not be allowed; and the court should dismiss the ostensible action when the futility of the attempt to institute it is made manifest.

APPEALS from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This was an action commenced by the attorney general without special authority and without leave of any court against numerous defendants who may be classified as follows: (1) The railway company, hereinafter called the corporation; (2) several directors of that company who were such in 1899 and 1900 and also at the time of the commencement of the suit; (3) several persons, some of them included in the second class, who were and still are directors of the North American Company; (4) *Fred Vogel, Jr.*, who was a director of the North American Company at the commencement of the action but not at the time of the acts complained of in 1899 and 1900; (5) the North American Company; and (6) several persons who were mayor and aldermen of the city of Milwaukee in 1899 and 1900.

Attempted service of summons on all of said defendants in the month of August, 1907, having been made, the plaintiff gave notice of examination under sec. 4096, Stats. (1898), of those in Wisconsin, and filed an affidavit that, in order to enable it to plead, an examination of said persons was necessary. It set forth on information and belief

that in the months of December, 1899, and January, 1900, the defendants constituting the directors of the corporation unlawfully and by collusion paid over large amounts of the corporation's money or property to the defendant North American Company and its directors which was intended to be and was unlawfully paid over to the defendants, who were then mayor and several aldermen of the city of Milwaukee, whereby was induced the granting of an amended and extended franchise under which the corporation has since operated its street railway business in Milwaukee. Plaintiff asserted as the general nature of this action (1) to compel the defendant directors and officers of the corporation to account for their said official conduct in the management and disposition of its funds; (2) to compel the defendant directors of the corporation and also the defendant directors of the North American Company to account for their official conduct in management and disposition of the funds and property of that corporation; (3) to compel both such directors to pay to the corporation all sums of money and value of all property which any of them had acquired to himself or transferred to others or had lost or wasted by any failure of duty; (4) to suspend the said defendant officers of the corporation for abuse of their trust; (5) to remove said defendant directors and officers of the corporation for gross misconduct; (6) to set aside all alienations of property of the corporation made by said defendant directors and officers contrary to the provisions of law or for purposes foreign to the lawful business and objects of said corporation in all cases where the person receiving the property so alienated knew the purpose; (7) to compel the defendant directors and officers of the corporation and also the defendant directors and officers of the North American Company to account for all funds and property illegally and fraudulently obtained and used by them in fraudulently and corruptly securing the franchise aforesaid of January 2,

1900; (8) to compel said defendants mayor and aldermen to account for all funds and property of the corporation illegally or fraudulently paid to them for said purpose and to disclose the names of all persons making any such payment and the time, place, and circumstances thereof; and (9) to restrain the defendant corporation from exercising any rights under, and to set aside, vacate, and annul, the said franchise ordinance of January 2, 1900.

The corporation, the several directors thereof, *Fred Vogel, Jr.*, director of the North American Company, the mayor, each separately, and the several defendant aldermen together, filed petitions with the circuit court praying it to adjudge and determine that the plaintiff be not entitled to such or any examination or discovery as against the petitioners and that the notice and subpœna be suppressed; each of said petitions asserting that all cause of action for accounting or recovery of money or property was barred by the statute of limitations. These petitions were all denied, and the same defendants, respectively, appeal from the orders of denial.

For the appellant the *Milwaukee Electric Railway & Light Company* there was a brief by *Miller, Mack & Fairchild,* and oral argument by *George P. Miller.*

For the appellants *Rose* and others there was a brief by *Ryan, Ogden & Bottum,* and oral argument by *Hugh Ryan.*

For the appellant *Pfister* there was a brief by *Quarles, Spence & Quarles,* and oral argument by *T. W. Spence.*

For the respondent there were briefs by the *Attorney General, Russell Jackson,* deputy attorney general, and *Franz C. Eschweiler,* special district attorney, and oral argument by *Mr. Jackson* and *Mr. Eschweiler.*

DODGE, J. The attorney general asserts that his cause of action is that declared or created by sec. 3237, Stats. (1898), and placed in the state, to be exercised by the attorney gen-

eral, by sec. 3239, Stats. (1898). These statutes have their origin in the legislation of New York (part 3, ch. 8, tit. IV, §§ 33, 35, N. Y. R. S. 1829), enacted in response to the opinion, or doubt, of Chancellor KENT that no power of supervision or control over other than charitable corporations was vested in the court of chancery. *Att'y Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371. Their purpose was to confer new jurisdiction on the court. In this state, apparently, Chancellor KENT's doubt of the power of the court has not been considered serious. In *Gores v. Day,* 99 Wis. 276, 74 N. W. 787, it is said: "Sec. 3237, R. S. 1878, does not materially add to the jurisdiction of the court; that existed under its general equity powers." The same idea was reaffirmed most definitely in *Harrigan v. Gilchrist,* 121 Wis. 127, 293, 99 N. W. 909, citing *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57. However, it is now beyond debate that the circuit courts are vested with such jurisdiction and that the statutes in question were framed for the purpose of declaring it. By sec. 3239 the courts are required to exercise that jurisdiction when moved thereto by the attorney general in the name of the state, by a creditor or by a managing officer of the corporation, but this category is not exclusive, for the action may equally be instituted by a member or stockholder. *Gores v. Day, supra; Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 256, 75 N. W. 964; *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69; *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 112 N. W. 1097. Counsel for plaintiff contend, however, that such section does expressly empower the state to bring the action whenever the relief described in sec. 3237 is sought. If such be the meaning and purpose, then the section equally authorizes a creditor to sue in all cases. There is no difference in the language in its application to one or the other. But this court has declared that it does not authorize a creditor to sue unless he has a direct personal interest in the relief sought. *Killen v. Barnes,*

106 Wis. 546, 82 N. W. 536. But the plaintiff's contention that the statute is to be so construed is directly contradicted both in New York and Wisconsin. *People v. Booth,* 32 N. Y. 397; *People v. A. & S. R. Co.* 57 N. Y. 161; *People v. Ingersoll,* 58 N. Y. 1; *People v. B., F. & C. I. R. Co.* 89 N. Y. 75, 93; *People v. Lowe,* 117 N. Y. 175, 191, 22 N. E. 1016; *Swan v. Mut. R. F. L. Asso.* 155 N. Y. 9, 18, 49 N. E. 258; *Att'y Gen. ex rel. Saunders v. Albion Academy,* 52 Wis. 469, 9 N. W. 391. These decisions fully sustain the view that sec. 3239 evinces no legislative purpose in conflict with sec. 2605, Stats. (1898), commanding that every action shall be prosecuted in the name of the real party in interest, but merely declares that the action for the relief mentioned shall be entertained by the court when brought by either of the kinds of plaintiff described when he is the real party in interest; in other words, when the right to the relief is in him. It would be subversive of all principle to permit a creditor to demand removal of officers for misconduct which in no wise affected his interests or even to call them to account or to reclaim assets when the corporation is entirely solvent and the creditors' rights not jeopardized, or when the corporation is competent and ready to enforce such right. So, also, it is anomalous for the state to sue to protect merely private rights which the real owners are entirely competent to protect either with or without suit, or to surrender them if they choose. Such mere sentimental or remote interest as the whole public may have that corporate officers, or other persons, behave well, or that private corporations, or indeed individuals, do not squander their own money, is not that sort of right which constitutes the state the "real party in interest" in a suit to relieve a private corporation of recreant officers or to recall assets to the treasury of a corporation or the pockets of an individual.

It is not here denied or affirmed that the legislature, which is empowered to declare the public policy, might by appropri-

ate legislation assert a public interest in some such situation sufficiently direct to warrant the state to bring suit. The one case in New York relied on by respondent turned upon a statute to which such effect has been given by construction. *People v. Ballard,* 134 N. Y. 269, 32 N. E. 54. There the attorney general brought suit for removal of officers of a private corporation and to set aside transfer of entire assets to a foreign corporation against wishes of some stockholders, and his right to do so under their equivalent for our sec. 3239 was assailed. After equal division in one branch of the court of appeals, the other branch, by majority of one, sustained his right under another and later statute (sec. 1808, Bliss's Code) authorizing him to bring such action "if in his opinion the public interests require that an action be brought." This was held to be a legislative declaration of policy and to require the entertainment of the action by the court without inquiry into the state's actual interest. We have no similar statute in Wisconsin to require consideration of either its validity or its construction. Another illustration of such legislative regulation of the state's right to sue to protect or enforce primary rights of individuals is presented and considered in *Swan v. Mut. R. F. L. Asso., supra,* and *Greeff v. Equitable L. Assur. Soc.* 160 N. Y. 19, 54 N. E. 712.

Whether it might be competent for the legislature to declare a public policy that the state, by reason of its interest in the taxability of the corporate assets or to regulate such a corporation's charges with relation to its real investment or the like, shall have a right to institute suit to enforce the primary right of the corporation to reclaim misapplied assets or remove unsuitable or misbehaving officers, we need not now decide. It is clear upon authority of all the decided cases in New York and Wisconsin that sec. 3239 had no such purpose.

That the uncovery of assets and the reclamation thereof

either from the recipient or the recreant officers is a right vested in the corporation is too plain for debate and is universally declared by authority. *U. S. v. U. P. R. Co.* 98 U. S. 569; *Jenkins v. Bradley,* 104 Wis. 540, 552, 80 N. W. 1025; *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 112 N. W. 1097. An action for that purpose rests in the corporation and can be instituted only by it except that, when the corporation by its ordinary machinery and officers refuses to act, or is prevented by the adverse interests of those officers, a stockholder, as a *cestui que trust* of the corporation, may apply to a court of equity to practically coerce the corporation to bring such suit, and in such action may proceed to the enforcement of the right. *Jenkins v. Bradley, supra; Luther v. C. J. Luther Co.* 118 Wis. 112, 126, 94 N. W. 69; *Figge v. Bergenthal,* 130 Wis. 594, 109 N. W. 581, 110 N. W. 798. Another exception is in case of insolvency or threatened insolvency, when the creditor of the corporation becomes the real *cestui que trust* and may apply to a court of equity to accomplish the same results as above stated for his protection. *South Bend C. P. Co. v. Geo. C. Cribb Co.* 97 Wis. 230, 72 N. W. 749; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536; *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909. But, except in the case of charitable or eleemosynary, and perhaps municipal, corporations (though the latter exception is denied by some authority, *People v. Booth,* 32 N. Y. 397; *People v. Ingersoll,* 58 N. Y. 1), where the general public are interested in the application of the funds, obviously the state has no legal interest in the management or disposal of the funds of the corporation. Private corporations are organized for private profit, and, except as to their members and creditors, are as free to exercise their judgment over expenditures, nay even the donation, of their funds as an individual. *Figge v. Bergenthal, supra,* p. 616, 109 N. W. 581, 110 N. W. 789; *Interstate Commerce Comm. v. C. G. W. R.*

Co. 209 U. S. 108, 28 Sup. Ct. 493. The state, which is but another name for the general public, has no interest therein, save possibly in the case where a corporation charged with a duty to the public, as is this, might by dissipation of its assets or property disable itself from performing that public duty, a result which is not suggested in any way in this case and which, indeed, is pretty completely refuted by the showing that for seven years since the alleged wrongful expenditures the corporation has continued to perform its public function of operating a street railway. Authorities supporting this view are numerous, and in them will be found full discussion of that sort of interest which will qualify the state to sue in equity as plaintiff. *U. S. v. U. P. R. Co.* 98 U. S. 569; *People v. Booth, supra; People v. A. & S. R. Co.* 57 N. Y. 161; *People v. Ingersoll,* 58 N. Y. 1. Plaintiff has succeeded in finding no instances where a contrary view has been decided by courts of last resort, except the *Ballard Case* already mentioned, but has cited us to two decisions of the supreme court of New York, both of them reviewed on appeal in the court of appeals and deprived of all authority by the expression of contrary views in that court. We think these authorities are sustained by very obvious reason and that the rule thereof is sound, and that, so far as the present action is addressed to the subject of reclamation of assets, the state is without interest to maintain it.

The cause of action for the suspension or removal of recreant corporate officers is hardly less clearly primarily in the corporation. Such wrongful conduct is an injury to the corporate entity and, through it, to its stockholders, or, if insolvent, to its creditors. If the policy such officers pursue is wasteful of its property the corporation suffers the pecuniary loss. If such conduct is so illegal as to constitute an abuse or usurpation of corporate franchises outside its charter, the corporation may thereby be rendered a wrongdoer and subject to the penalties denounced by statute. It is also obvious

that the state or public can have no direct interest in the question whether such officers should be removed. It is provided by statute with remedies adequate to all possible public interest. It may see to it that the offices are not usurped and illegally held so that the corporation itself cannot be charged with the officers' acts. Subd. 1, sec. 3466, Stats. (1898), expressly provides this remedy. If the officers are legally in place, then their acts are the acts of the corporation and the state is given ample remedy against it by sec. 3241, Stats. (1898), in case their acts lead the corporation into any of several situations which the legislature has catalogued as affecting public interest, namely: (1) In case it shall offend against any provision of law under which it shall have been created, altered, or renewed; (2) violated any provisions of law by which it shall have forfeited its charter by abuse of its powers; (3) whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; (4) when it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, or franchises; and (5) when it shall exercise franchises or privileges not conferred upon it by law. If, on the other hand, the acts of such officers are not in accordance with the wishes of the corporation—that is, of its stockholders,—proper remedy rests in some of those whose rights are outraged to either restrain the action or remove the officers. It has been decided that only where the action of the corporation is wilful should the attorney general be permitted to bring suit to annul its charter under sec. 3241 (*State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496, 66 N. W. 512), and while the corporation, technically, may be responsible for what its duly elected officers do within their powers, obviously it is not the policy that the state should intervene until the corporation has had reasonable opportunity to restrain or remove such officers and has by silence or neglect become committed to approval of their acts, in which event

it shall have its remedy against the corporation itself. The authorities are well-nigh universal to the proposition that the public has no legal interest in the question of suspension or removal of officers of private business corporations (*U. S. v. U. P. R. Co.* 98 U. S. 569; *People v. Lowe,* 117 N. Y. 175, 191, 22 N. E. 1016; *Att'y Gen. ex rel. Saunders v. Albion Academy,* 52 Wis. 469, 9 N. W. 391); and in that view we now concur.

There remains one other general purpose of this action asserted by the state, namely, to restrain one defendant, the corporation, from exercising any rights under, and to set aside and annul, the franchise granted January 2, 1900, alleged to have been induced by bribery. Counsel concede that this is not within any purpose authorized by sec. 3237, and seem to concede that of itself it is not authorized at all by any statute, but claim that it might be accorded as ancillary and supplementary in association with the other relief sought. If we take the attorney general at his word, the subject might be easily disposed of, since we have found that the action cannot be maintained to accomplish any of the substantive forms of relief to which this is considered ancillary. However, it is set up by the affidavit with as much apparent reliance as any of the other general purposes of the action and should perhaps be considered. This court has often declared that the question of the validity of a franchise granted either by the state or through the medium of a city council to a street railway company can be questioned only in an action in the nature of *quo warranto* brought by the state. *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 39, 69 N. W. 794; *Stedman v. Berlin,* 97 Wis. 505, 509, 73 N. W. 57; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 517, 83 N. W. 851; *Allen v. Clausen,* 114 Wis. 244, 249, 90 N. W. 181; *Beloit, D. L. & J. R. Co. v. Macloon, post,* p. 218, 116 N. W. 897. This declaration would of course in terms

exclude a suit in equity, even by the state, to restrain the unlawful exercise of franchises ostensibly granted by a void ordinance. Whether the court in using that language in the above cases meant such exclusion it is not necessary now to ascertain. At any rate, it obviously did declare that the only interest sufficient to support an action of any sort to the end of ascertaining the validity or regularity of such franchise was in the state. Hence the obstacle which precludes this action as to all the other forms of relief is not present with reference to this one. If the action can be maintained at all to declare those franchises void it should be brought by the state. But here we meet a distinction not very clearly recognized or maintained through the respondent's brief. That distinction is between the state of Wisconsin and the attorney general. Their power and authority is neither identical nor coterminous. There may be many things which the state of Wisconsin may do without the conclusion resulting that the attorney general may do them. In Wisconsin, otherwise than in many if not most states, the powers of the attorney general are strictly limited. He is a constitutional officer, but by the constitution he is given only such powers as "shall be prescribed by law." Sec. 3, art. VI, Const. It is therefore essential to the maintenance of an action brought by the attorney general *ex officio* and *sua sponte* that we should find some statute authorizing it. His general powers, which are conferred by sec. 163, Stats. (1898), may be summarized to prosecute or defend all actions, etc., in the supreme court in which the state shall be interested or a party and to appear for the state and prosecute or defend in any circuit court or before any officer whenever requested by the governor or either branch of the legislature. This action was not in the supreme court but in the circuit court, and was not requested by the governor or either branch of the legislature. Hence no authority

can be deduced from this section. When we turn to the subject of regulation of corporations we find sec. 3240, Stats. (1898), directing that an action may be brought in the name of the state for the purpose of vacating or annulling an act of incorporation or an act renewing corporate existence on the ground that the same was obtained by fraud, but not in the discretion of the attorney general, and only when the legislature shall direct. By sec. 3241, Stats. (1898), an action in the name of the state is authorized for the purpose of vacating the charter or annulling the existence of a corporation upon various grounds, among them the exercise of unlawful franchises, but here, too, the discretion of the attorney general is restrained and the suit must be "on leave granted by the supreme court upon cause shown;" and that this is no mere idle or formal restraint upon the attorney general has been declared in *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496, 66 N. W. 512; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 39, 69 N. W. 794. By sec. 3466, Stats. (1898), the attorney general is granted authority in his discretion to bring proceedings in the nature of *quo warranto* or *scire facias* when any person usurps any franchise within this state or any office in a corporation. This of course is not such an action. Finally, sec. 3236, Stats. (1898), authorizes the courts to entertain an action at the suit of the attorney general to restrain a corporation by injunction from "assuming or exercising any franchise, liberty or privilege or transacting any business not authorized by its charter." If this may be considered an authority to the attorney general, still it is not suggested here that the corporation defendant is exercising any franchise or prosecuting any business not authorized by its charter. It is a street railway company, and its charter as such authorizes it to exercise all the franchises and do all the business provided for by the ordinance in question. No other statute has been

suggested to us vesting the attorney general with any authority to commence an action such as this. Obviously that statutes examined are not so effective.

We therefore reach the conclusion that there exists no cause of action which may be maintained by the attorney general in the name of the state of Wisconsin for any of the general purposes asserted herein. The right to call men to the witness stand and examine them as to their private affairs is a most serious invasion of their liberties, if not indeed a deprivation of property in many cases (*Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456), and can be justified only on the ground that courts are entitled to the information in aid of a proper judicial proceeding. Sec. 4096, Stats. (1898), was intended to go no further, and, where it is apparent that there is no such judicial proceeding, examination should not be allowed. The courts under such circumstances, when the futility of the alleged attempt to institute a suit is made manifest, should not only prevent an examination but should dismiss the ostensible action. *Madison v. M. G. & E. Co.* 129 Wis. 249, 108 N. W. 65.

By the Court.—Order of the circuit court is reversed, and cause remanded with directions to dismiss the action.

TIMLIN and BASHFORD, JJ., took no part.

BONNETT, Respondent, vs. VALLIER, Factory Inspector, and others, Appellants.

May 18—June 5, 1908.

CONSTITUTIONAL LAW: POLICE POWER: REGULATION OF TENEMENT HOUSES, ETC. (1) *Who may challenge validity of statute.* (2) *Injunction against state officials.* (3) *Unconstitutional enactment a nullity.* (4, 5) *Duty of courts: Doubts resolved in favor of validity.* (6–10) *Extent of police power: Judicial and legislative questions: "Reasonableness."* (11–18) *Tenement and lodging houses: Construction and maintenance: Unreasonable requirements: Differences in localities: Official approval of plans: Width of street courts: Light, equipment, etc.: Equal protection of the laws: Penalties preventing resort to courts.* (19) *Ideal and practical regulation.* (20) *When statute wholly void.*

1. A person specially injuriously affected by enforcement of an unconstitutional law may in judicial proceedings challenge the validity thereof.
2. An action against state officials to enjoin them from enforcing an unconstitutional legislative enactment is not an action against the state. In such circumstances the law, so called, affords such state officers no protection. They are judicially regarded as acting in their personal capacities only.
3. An unconstitutional legislative enactment, though law in form, is in fact not law at all. "It confers no rights; it imposes no duties; it affords no protection; . . . it is in legal contemplation as inoperative as though it had never been passed."
4. A court, upon its jurisdiction being properly invoked for the purpose, is in duty bound to test a legislative enactment by all constitutional limitations bearing thereon and condemn it if it be found illegitimate and thus uphold the constitution as superior to legislative will.
5. In testing a legislative enactment as regards its constitutionality, all reasonable doubts must be resolved in favor of legislative power.
6. Legislative authority in the field of police power, the same as in any other, is fenced about on all sides by constitutional limitations. It cannot properly extend beyond such reasonable interferences as tend to preserve and promote the enjoyment, generally, of those "unalienable rights" with which all men are endowed and to secure which "governments are instituted

among men." When it goes beyond that it enters the field of the destructive and so offends against some constitutional limitation.

7. What constitutes a proper subject for regulation under the police power is a judicial question. Matters of mere expediency in respect thereto are wholly for legislative cognizance. What is reasonable is primarily for legislative judgment, but in the ultimate it is a judicial question. There must be reasonable ground, having regard for the public welfare, for the interference, and the means adopted to accomplish the purpose in view must be reasonably necessary.

8. What is reasonable in any given case being a matter resting in human judgment and difficult of ascertainment, in all doubtful cases judicial authority must defer to legislative wisdom, but where the interference is plainly excessive the duty of the court to repel the encroachment is absolute.

9. What is reasonable is not necessarily what is best but what is fairly appropriate to the purpose, under all the circumstances. The scope of the term "reasonable" as regards any situation must be measured having regard to the fundamental principles of human liberty as understood at the time of the formation of the constitution, adapting the same to modern conditions.

10. In determining what is reasonable the court must look to the language of the statute and the facts which appear because of judicial knowledge thereof or otherwise.

11. The construction and maintenance of tenement, lodging, and boarding houses is a proper subject for legislative regulation, but the degree of regulation permissible varies greatly according to circumstances.

12. A police regulation in the field mentioned in the last foregoing paragraph which is not excessive as to a large city might be held unreasonable if applied to the state at large.

13. Limitations in the field suggested impossible or impracticable to comply with, either because of absence of facilities necessary therefor or expense so great as to render the regulation prohibitive in many situations, are unreasonable.

14. A general police regulation down to minute particulars of the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith in the absence of any official approval of plans and specifications in advance, and containing no provision for such approval, is unreasonable.

15. Where the penal feature of a police regulation is so severe, having regard to the nature of the regulation, as to efficiently intimidate property owners from using their property at all for tenements or lodging-house purposes and from resorting to the

courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. It is a defiance of the equal protection of the laws rendering the act void irrespective of whether its provisions would otherwise be valid.

16. To penalize good-faith resistance to the enforcement of a law by judicial interference is unreasonable and indefensible from any point of view. It denies the equal protection of the laws; it violates the constitutional guaranty to every person of a certain remedy in the law for all injuries to person and property, and violates every principle of civil liberty.

17. A law regarding the construction of tenement houses requiring street courts to be six feet in width between the lot line and the opposite wall of the building—that is, under all conditions and in all localities to be at least six feet wide,—is an unreasonable interference.

18. A police regulation making every habitation regardless of locality a boarding or lodging house in case the proprietor allows a person not a member of his family to have a sleeping room in the house, and regulates the maintenance of the house as regards light, location of beds, equipment with water-closets, etc., is an unreasonable interference.

19. There is a wide interval between the ideal and the practical. The latter standard should prevail as to legislative regulaitons as to the construction and maintenance of tenement, lodging, and boarding houses. Common sense as to what is reasonable in such matters should prevail, not the extreme views of well-meaning persons, as to what is for the best.

20. Where parts of a law viewed by themselves are unconstitutional and other parts so viewed are not, the former may be condemned and the latter upheld if the two are separable, otherwise not. In case the act as a whole has one or more invalid features pervading the entire act it must be regarded as an entirety and all be condemned as unconstitutional.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action by a property owner specially affected by ch. 269, Laws of 1907, against public officers required by the terms of such chapter to enforce its provisions, to restrain them from doing so by interfering with the plaintiff in the construction of a building upon a lot owned by him in the city of Milwaukee.

The complaint sets forth facts sufficient to entitle plaintiff to the relief prayed for if the law referred to is unconstitutional. Among others these things are substantially stated: Plaintiff entered into a contract in writing with a construction company for the building of a four-story flat building upon a lot owned by him in the city of Milwaukee, Wisconsin, having a frontage of fifty feet on one of the streets of said city and a depth of one hundred and fifty feet. The plans for the building were duly approved by the building inspector of said city before the contract was let and they complied in all respects with ch. 269, Laws of 1907, except as to street courts. The plans call for a building forty-four feet wide, except the rear portion for a length of twenty-two and one-half feet, which is fifty feet wide. For a distance of seventy-two feet from the street on each side of the building there is to be an open space known as a street court three feet wide, open from the ground to the sky, whilst the law aforesaid required said courts to be six feet wide. The courts as planned satisfy all reasonable necessities. To require them to be six feet wide would be unreasonable, would render his plans for the building useless, his lot unsuitable for such a building, and irreparably damage him. Defendants, unless enjoined by the court, in case the construction company proceeds with the building as planned will cause plaintiff or his agents, or the officers, agents, and employees of the company to be arrested, his permit to construct the building will be revoked, and he will be prevented from going on with the work as planned. Said law is so unreasonable as to be unconstitutional and void. It applies to all towns, cities, and villages of the state, whereas it is impracticable to comply with it in the absence of a sewer system and system of water supply. There are many such cities, villages, and towns where it would be impossible to equip a building as required by the law. Plaintiff and all those who may act in his behalf in the construction of a building upon

his lot as planned are menaced with arrest and prosecution under said law for each and every day they persist in the work. Plaintiff has no adequate remedy at law for the injuries to him threatened as aforesaid.

An interim injunction was granted restraining defendants from doing the things pending the action which the same was instituted to permanently restrain, a bond for $250 being given.

The defendants demurred to the complaint for insufficiency and the demurrer was overruled. Defendants appealed from the order generally. It covered the ruling as to the demurrer and the one regarding the temporary injunction.

The defendants entered a motion in this court to dismiss the action upon the ground of its being an action against the state and to dissolve the temporary injunction and for a temporary injunction restraining the plaintiff and all persons acting for him from proceeding with the construction of the building mentioned in the complaint pending the action.

For the appellants there was a brief by the *Attorney General* and *A. C. Titus,* first assistant attorney general, and oral argument by *Mr. Titus.* They contended, *inter alia:* (1) The action seeks to enjoin the enforcement of the criminal laws of the state, and therefore cannot be maintained. It is a general rule that a court of equity will not lend its aid to prevent an illegal act nor to enjoin the enforcement of criminal laws. 1 High, Injunctions (4th ed.) §§ 20, 68; *Tyler v. Hamersley,* 44 Conn. 419; *Holderstaffe v. Saunders,* 6 Mod. 16; *Tiede v. Schneidt,* 99 Wis. 201, 214; *Hemsley v. Myers,* 45 Fed. 283; *Gault v. Wallis,* 53 Ga. 675; *Yates v. Batavia,* 79 Ill. 500; *Creighton v. Dahner,* 70 Miss. 602; *Davis v. Society, etc.* 16 Abb. Pr. N. S. 73; *Kramer v. Board of Police,* 21 Jones & Sp. (53 N. Y. Super.) 492; *Balogh v. Lyman,* 6 App. Div. 271; *Kenny v. Martin,* 11 Misc. Rep. 651; *M. Golden & Co. v. Guthrie,* 3 Okl. 128, 41

Pac. 350; *Burnett v. Craig,* 30 Ala. 135; *Poyer v. Desplaines,* 123 Ill. 111; *Skakel v. Roche,* 27 Ill. App. 423. The only exceptions to this general rule are in certain cases where property rights are being destroyed or are threatened with destruction or with being taken away, as in the case of *Schlitz B. Co. v. Superior,* 117 Wis. 297; or where the plaintiff in the injunction action is being subjected to repeated or unreasonable prosecutions or actions, as in *Wallack v. Society, etc.* 67 N. Y. 23; *Shunkle v. Covington,* 83 Ky. 420; *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467. Some cases hold that prosecutions for criminal offenses may be restrained when the statute under which such prosecutions are brought is alleged to be unconstitutional. *M. Schandler B. Co. v. Welch,* 42 Fed. 561; *Ex parte Young,* 209 U. S. 123. Other cases hold to the contrary. *Burnett v. Craig,* 30 Ala. 135; *Skakel v. Roche,* 27 Ill. App. 423; *S. Cohen & Co. v. Comm'rs,* 77 N. C. 2. (2) The action, though in form against individuals, is in fact an action against the state, and consequently cannot be maintained without the consent of the state. It is elementary that the state cannot be sued except as the legislature shall provide by law therefor. Const. art. IV, sec. 27; *C., M. & St. P. R. Co. v. State,* 53 Wis. 509; *Houston v. State,* 98 Wis. 481, and cases cited; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563; *Taylor v. Hall,* 71 Tex. 206, 213. Such immunity of the state from suit may not be avoided by indirection. 26 Am. & Eng. Ency. of Law (2d ed.) 488, 490. A suit to restrain the attorney general of the state from enforcing a penal statute is a suit against the state. *Union T. Co. v. Stearns,* 119 Fed. 790; *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79; *Rhodes & J. Mfg. Co. v. New Hampshire,* 70 Fed. 721; *W. U. Tel. Co. v. Myatt,* 98 Fed. 335. This statute is penal and offenders against it may be punished as for a misdemeanor, and this court has held that "the administration of the criminal laws is a state affair, and the offi-

cers engaged in such duties represent the sovereign power of the state." *Northern T. Co. v. Snyder,* 113 Wis. 516, 538; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 579. (3) The complaint is defective because it does not allege or show that plaintiff will suffer irreparable injury if an injunction be not granted. (4) The act in question, ch. 269, Laws of 1907, is valid. *Health Dept. v. Rector, etc.* 145 N. Y. 32, 49; Prentice, Police Powers, 253–255, 260, and cases cited; 3 Birdseye, R. S. of N. Y. 3622 *et seq.;* 4 id. (Supp.) 931 *et seq.; People ex rel. Kemp v. D'Oench,* 11 N. Y. 359; *New York v. Herdje,* 68 App. Div. 370; *Tenement House Dept. v. Moeschen,* 179 N. Y. 325; *Moeschen v. Tenement House Dept.* 203 U. S. 583; *Welch v. Swasey,* 193 Mass. 364, 79 N. E. 745; Freund, Police Power, §§ 127, 128; Tiedeman, Lim. of Police Power, § 122*e;* *Knoxville v. Bird,* 12 Lea, 121, 47 Am. Rep. 326; *Willy v. Mulledy,* 78 N. Y. 310, 314; *In re Wilshire,* 103 Fed. 620; *State v. Robb,* 100 Me. 180, 185, 186.

For the respondent there was a brief by *Rose, Witte & Rose,* and oral argument by *D. S. Rose.*

A brief was also filed by *Edward W. Frost* on behalf of the Children's Betterment League of Milwaukee.

MARSHALL, J. The complaint shows that respondent would be specially injuriously affected by enforcement of ch. 269, Laws of 1907. Therefore we will regard as the sole matter submitted for consideration that of whether such law is unconstitutional.

That it is competent under the police power by legislative enactments to regulate the construction and maintenance of tenement and lodging houses to some extent, and that legislative activity in that field within all proper limits is commendable, are not open to serious controversy. In some situations such regulations are imperative in the interest of public safety and public health. The court approaches the

consideration of the law in question fully appreciating, it is thought, the worthy motives of those within and those without the legislature to whose efforts the legislation is attributable. Good intentions in the passage of a law or a praiseworthy end sought to be attained thereby cannot save the enactment if it transcends, in the judgment of the court, the limitations which the constitution has placed upon legislative power. In such cases the law, so called, is not a law at all. As has been aptly said:

"It confers no rights; it imposes no duties; it affords no protection; . . . it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Co.* 118 U. S. 425, 442, 6 Sup. Ct. 1125.

The appeal is often made to courts directly or indirectly to look favorably upon a law because of the worthy purpose in the minds of the promoters in securing its place upon the statute books. That cannot go to the extent of causing hesitancy or failure to condemn a legislative act which clearly exceeds the lawmaking power. Courts have their duty to perform in a case like this and, however unpleasant it may be, they cannot turn aside on any account whatever, even in the face of manifestly the very best of intentions upon the part of the lawmakers and promoters. The greatest constitutional lawyer of our country during its early history aptly said:

"Good intentions will always be pleaded for every assumption of power, but they cannot justify it. The constitution was made to guard the people against the dangers of good intentions. When bad intentions are boldly avowed the people will promptly take care of themselves. They will always be asked why they should resist or question the exercise of power which is so fair in its object, so plausible and patriotic in appearance, and which has the public good alone confessedly in view. Human beings, we may be assured, will generally exercise power when they get it, and they will exercise it most undoubtedly under a popular gov-

ernment under the pretense of public safety or high public interest. . . . They think there need be little restraint upon themselves."

Again they sometimes, it seems, lose sight of the fact that there are such restraints, and so it becomes necessary for the courts in the performance of their constitutional duty to call that to mind. The fathers foresaw that in writing into the constitution those significant words:

"The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Sec. 22, art. I, Const. Wis.

The general principles by which the constitutionality of such a law as the one in question must be determined have been so often, so recently, and so fully discussed here that it is useless to go over the ground again at this time. It is sufficient to refer to the following: *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *State ex rel. Jones v. Froehlich,* 115 Wis. 32, 91 N. W. 115; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137.

The general effects of the authorities are these: An act of the legislature is to be sustained unless it violates some constitutional limitation beyond reasonable question. Such limitations exist by implication as well as by express prohibition. A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment, generally, of those "unalienable rights" with which "all men are endowed" and to secure which "governments are instituted among men," and must not violate any express prohibition or requirement of the state or national constitution. When it goes beyond the scope indicated and enters into the dominion of the destructive, it is illegitimate and offends against some constitutional restraint, express or implied, and though law in form, it is, as before said, not

law at all, and whether an act purporting to be within the field of police power is reasonable or not, in the ultimate, is a judicial question. There must be reasonable ground for the police interference and also the means adopted must be reasonably necessary for the accomplishment of the purpose in view. So in all cases where the interference affects property and goes beyond what is reasonable by way of interfering with private rights, it offends against the general equality clause of the constitution; it offends against the spirit of the whole instrument; it offends against the prohibitions against taking property without due process of law, and against taking private property for public use without first rendering just compensation therefor.

We pass over, as already indicated, as not open to fair controversy the question of whether the subject dealt with by the law before us is one proper for legislative interference under the police power. So we come at once to the secondary question of judicial cognizance of whether the manner of interference is reasonable.

"Small limitations," it is said, "of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil," while "larger ones could not be, except by the exercise of the right of eminent domain." *Rideout v. Knox,* 148 Mass. 368, 372, 19 N. E. 390, 392; *Sawyer v. Davis,* 136 Mass. 239, 242. Note the significant words "small limitations." What constitutes such limitations must necessarily be determined with reference to the exigencies of the particular situation. So actual destruction of private property under the police power in some cases is proper, while very little interference in others might be held improper. *State v. Redmon, supra.* There is no certain test by which what is reasonable in any given case can be definitely measured. It is a matter resting in human judgment. So the line between what is reasonable and what is not, marking the boundary of constitutional authority of the

legislature, is one often difficult of ascertainment, rendering it very necessary, in all doubtful cases, for the judiciary to defer to the wisdom of the legislature. But when the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the constitution is absolute. It has no discretion in the matter. *Marbury v. Madison,* 1 Cranch, 137.

It is said "that an attempt to give a specific meaning to the word 'reasonable' is 'trying to count what is not number, and measure what is not space.'" *Altschuler v. Coburn,* 38 Neb. 881, 890, 57 N. W. 836, 838. It is not synonymous with "expediency." Matters of that sort are wholly for legislative cognizance. As applied to means to a legitimate end it suggests not necessarily the best or the only method, but one fairly appropriate at least under all the circumstances. In the ultimate, the scope of the term as regards any situation must be measured having regard to the fundamental principles of human liberty, as they were understood at the time of the formation of the constitution and were intended to be impregnably entrenched thereby, adapting the same, of course, to our modern conditions. Those principles have not changed in the years that have elapsed since the constitution was formed. They are unchangeable and are of no less but rather of greater importance than they were when the framers of the constitution attempted so carefully to guard them.

"Reasonable," as applied to a law, is manifestly not what extremists upon the one side or the other would deem, in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what "from the calm sea level," so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be said to judicially know because of their

common nature or otherwise. *People ex rel. Kemmler v. Durston,* 119 N. Y. 569, 24 N. E. 6; *Schollenberger v. Pennsylvania,* 171 U. S. 1, 8, 18 Sup. Ct. 757.

It must be conceded that the degree of regulation of the construction, maintenance, and manner of occupancy of tenement houses and lodging houses which is reasonable must vary greatly according to density of population and other circumstances. What would be reasonable in a very large city might be highly unreasonable in the country or in the small cities and villages of the state. Requirements as to large structures to be occupied by many persons might be very unreasonable as to the smaller class of the same general class of structures to be occupied by very few persons. Again, requirements as to water service and fire hazard, not difficult to comply with by moderate expense in cities where there is a water and sewer system which are essential to the equipment of buildings in those respects, might be plainly reasonable, while such requirements in country districts and the smaller cities and villages where there are no such facilities, might be just as plainly absurd. The character of the structure and its equipment, as regards the expense required to comply with the law in a large city, where the added cost is warranted, not only by the degree of danger to be guarded against but by the returns a proprietor could reasonably expect to derive from his investment, might be within the boundaries of reason, while the same requirements as to sparsely settled districts and in small cities and villages, where the conditions as to such dangers and the expense that could prudently be incurred in erecting the structure are entirely different, might be plainly outside the boundaries of reason. In *Tenement House Dept. v. Moeschen,* 179 N. Y. 325, 335, 72 N. E. 231, the court observed that an act of the nature of the one under consideration "necessary for the city of New York, might not have the slightest application to Albany or

Buffalo," and in *Health Dept. v. Rector, etc.* 145 N. Y. 32, 41, 39 N. E. 833, 836, that

"no one would contend that the amount of the expenditure which an act of this kind may cause, . . . is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made the act would without doubt violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of the work or the character of the improvement demanded. The improvement or work must in itself be reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges."

Turning to the law in question, in the light of the foregoing, the most striking general feature which challenges our attention is that it applies to every part of the state, country districts, small cities, and villages—every portion is subject to the same degree of regulation as the city of Milwaukee, notwithstanding the obvious fact, as suggested in effect in the New York case above cited, that the conditions calling for such interference are so widely different that it would seem need for classification would have occurred to the legislative mind at once, in dealing with the matter, especially in view of the requirements which are entirely unsuitable to locations where water and sewer systems do not exist, and the calls for an expensive grade of buildings common to

large cities, but which no prudent man would seriously think of erecting in some situations unless he could afford and designed to devote his means to charitable uses.

We find the law framed after the manner of the one in New York specially designed for the great city of New York and said by the New York court, as indicated, that it might be entirely unsuitable for even such cities as Albany and Buffalo, with many new features added to the model and many of those presented in such model much more severe, and then the whole applied to every part of the state.

To illustrate what has been said we will refer to a few of the most prominent features of the law.

Subd. 2, sec. 1636—162, Stats. (Laws of 1907, ch. 269), containing the requirement specially complained of, calls for lot-line courts reaching from the street, when permissible at all, to be at least six feet wide for all buildings four stories or less in height. So even for a small two-story structure to be occupied by two families, anywhere in the state, it must not be so placed that in case of a street court the width will be less than six feet. No such severe provision is found in any law of the kind anywhere else, even in the case where it is restrained in its effect to the largest city in the United States. We have no hesitancy in saying that the interference as to this matter, considering its general nature, is unreasonable. Whether it would in all respects bear the constitutional test, even as to large cities, as regards small two-story structures to be occupied by two families only, and a large class of houses that fall under the designation of lodging or boarding houses, especially in the outskirts of such cities, is not entirely free from doubt. We might well add, it is clearly on the border line, if not across it, of what is reasonable. We do not need to go further at this point and will not do so, but leave the matter for legislative consideration in the future with such caution as what has been said may afford.

Sec. 1636—169 requires every tenement house down to the most insignificant of such structures anywhere in the state to be equipped with substantially all the ordinary modern conveniences as to water supply common to cities where there is a public sewer system and public water system. That, it seems, no one taking a common sense view of the matter can considerately claim is reasonable. It is impracticable in the extreme, impossible would probably not be too strong a term to use, to comply with such requirements in many, even most, portions of the state. The result is that, except within a very limited area, the construction and enjoyment of even the most insignificant kind of tenement houses is, in effect, prohibited by the law. It is not likely that the promoters of the legislation, or the legislature, deliberately intended any such result. Presumably their minds were so engrossed with the importance of such regulations as to large cities, and possibly only to the largest city of this state, that the effect of the law upon the rest of the state was overlooked. Manifestly, the provision is highly unreasonable in the general sense, and whether in some of the particulars it does not go too far even for special localities is not entirely free from doubt.

The law contains specific requirements down to the minutest details as to the construction of stair halls and their accessories and fire-escapes, and, not content with the result of following such minute specifications, the legislature added a requirement that the stairs must have at least a carrying capacity, with a factor of safety of four, of seventy-five pounds per square foot when loaded over the entire area. Sec. 1636—153. That is to say, by the terms of the law, though a person constructs his stairs in all respects according to the precise specifications thereof, regardless of the size of the building or its location, if they do not possess the required carrying capacity, he and all concerned with him are subject

to be treated as criminals and to suffer the severe penalties prescribed.

There are particular requirements as to the method of construction to be followed too numerous to mention,—in the whole, such as to enhance the probable expense of building a tenement house to such an extent as to practically prohibit the construction of any outside of cities of the first or second importance. It is to be noted that in the New York model, which was apparently the guide and which applies, as indicated, only to the city of New York, a special exception from many provisions of the law was made for wooden tenement houses, not exceeding two stories in height, to be occupied by not more than four families and erected outside of prescribed fire limits. The act in question contains no saving clause at all for the protection of parties desiring to erect modest two-story tenement houses anywhere in the state. In that respect the act must be regarded, as to some situations at least, as practically taking property without due process of law and taking it for public use without rendering just compensation therefor, in violation of the constitutional provisions on those subjects, and violative of other constitutional restraints not necessary to mention. Whether these regulations are not, in many features, too severe even for the larger cities may well be the subject for study in case of a further effort to legislate in respect to the matter.

A further general feature of the law which arrests our attention is this: It is so particular and technical in its requirements that an ordinary person would not be reasonably safe in entering upon the work of constructing such a building as it deals with without the assistance of an expert architect to make the plans and specifications and even details, expert mechanics to execute the scheme, with the architect to supervise such execution, and, perhaps, a competent adviser as to the legal aspects of the matter, and, even then, the builder and all concerned with him in the matter, however

innocent so far as bad intent is concerned they might be, would be in considerable danger of many criminal prosecutions for as many separate violations of law, and being penalized in large sums of money and cast into and confined in jail besides, and yet there is no provision in the act to enable the builder before entering upon the work to obtain a certificate of sufficiency of his plans from some official source, which will protect him in case of a good-faith execution of the scheme. It is a very serious question as to whether that does not render the law unreasonable in the whole, especially since it reaches every part of the state, preventing any one from enjoying the ordinary privilege as heretofore of building a simple inconsequential two-story house for two families, which is commonly erected by the proprietor himself or by the use of ordinary mechanics and without the use of a skilled or perhaps any architect. Absence of such a provision from the act is peculiar to the one in question. There is much reason to suppose it was omitted by oversight. We cannot think it was omitted by design. The New York model covers the subject in a most particular way. Secs. 121 and 122 of the Tenement House Act, 3 Birdseye, Rev. Stats., Codes & Gen. Laws of New York, p. 3638. The same is true of the New Jersey law (sec. 182, ch. 61, Laws of 1904), and likewise of the law of Connecticut (sec. 25, ch. 178, Laws of 1905).

There is another general feature of the act which arrests our attention and that is the penal clause, particularly in view of the recent decision of the federal supreme court, that where a police regulation is sought to be made effective by danger of such punishment for violations thereof and such burdens upon unsuccessful efforts even to test its validity as to intimidate parties affected thereby from resorting to the courts in the matter, as to practically prohibit them from seeking any judicial remedy for supposed wrongs inflicted upon them, it denies to them equal protection of the laws

and renders the whole act void irrespective of whether its provisions would otherwise be valid.

We must view the penal provision in the light of the situation before adverted to, that the act is replete with requirements down to minor details and of a technical character in some respects, relative to buildings of the character dealt with, regardless of locality and in many respects regardless of the character of the structure other than the characteristics of two stories and designed occupancy or occupancy by two or more families, in the whole, as before indicated, not practicable for one to follow without expert advice in preparation and execution and not practicable to follow safely in all respects under those circumstances, and yet there is no provision for official approval of plans and specifications in advance of execution, so the builder and all concerned with him must proceed, if at all, wholly at their peril of having many violations of as many requirements discovered to have occurred, without any bad intent, and after it is too late to remedy the difficulty without serious and perhaps ruinous loss and too late to avoid in any way the severe punishments prescribed.

The penal clause is as follows:

"Sec. 1636—176. Every person who shall violate or assist in violating or who shall fail to comply with any of the provisions of this act or who shall resist the enforcement of any provision of this act shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten dollars nor more than two hundred dollars or by imprisonment in the county jail not less than fifteen days nor more than sixty days or by both such fine and imprisonment in the discretion of the court, and for each and every day after the first that such violation shall continue such person shall be subject to a fine of ten dollars in the discretion of the court in addition to that hereinbefore provided."

It will be noted that a person may unintentionally violate some one or any number of provisions and upon demand be-

ing made upon him by the authority charged with the duty of enforcing the law, however much he may think he is not at fault as to any particular matter, he is made guilty of a second offense if he fails to comply, and in case of a prosecution being commenced against him as to any such violation, and, we repeat, there may be many, and there be an entire absence of any bad intent, he will become guilty of a third offense, if he resists prosecution by standing trial, and the situation as to him will apply to all concerned with him, regardless of any intent to disobey the law or to unreasonably resist its enforcement. Further, upon its being determined judicially that any violation has occurred, and we again repeat there might be many, and without bad intent, no time is given to remedy the departure from the law; every day of the continuance will be counted and penalty upon penalty may be imposed till the violation shall be effaced, regardless of the diligence of the guilty person to remedy the wrong, and even regardless, as to many persons that might be guilty, of the possibility of their being competent to remedy the wrong at all. It is thus not difficult to see how under the law a person of moderate means, though acting in the best of good faith and with diligence, might, in the construction of a single building of moderate dimensions, have penalties accumulated against him to an enormous amount and be so menaced by the fact that every failure to comply with the law would add to the load and every instance of an application to the courts by way of attack or defense, regardless of good faith in the matter, would further add thereto, that no one but a man of courage would take the chances of building a structure affected by the act, especially in portions of the state where expert assistance in the matter is either not obtainable at all or obtainable without such expense as to render the act prohibitory.

Except as to the element making mere resistance to the enforcement of the act a separate offense the penal provision

would look somewhat different if a way were provided for official approval of plans and specifications at the outset, affording a reasonable basis for holding the builder guilty at least of negligence, constructive or actual, in case of his failing in execution, though even with the exception and the additional provision the penal feature would not be entirely free from difficulty. As it stands, the feature penalizing mere resistance to the law is clearly unreasonable and indefensible from any point of view. The effect of it would be to take property without due process of law, to violate sec. 9, art. I, of the state constitution guaranteeing to every person a certain remedy in the law for all injuries or wrongs which he may receive in his person, property, or character, and to violate every principle of civil liberty entrenched in the constitution.

We have read and reread the act without success to see if the particular matter under consideration can be reasonably seen to refer to resistance to its enforcement in any other sense than defending against a prosecution commenced under it. If this were the only difficulty with the penal clause it might be condemned without affecting the rest, but, taking the clause as a whole, in view of the general character of the act, combined with the significant absence of any facility for a prospective builder to reasonably protect himself by obtaining in advance of commencing his work an official approval of his plans, it seems that the dangers are so many and so great that an ordinary person would be quite liable to be intimidated into surrendering his right to use his real estate for tenement-house or lodging-house purposes rather than take the chances, or, if he did not make such surrender and proceeded to enjoy such right as circumspectly as practicable, be intimidated into submitting to the demands of those charged with the enforcement of the law and to prosecutions under it, regardless of whether he thought himself innocent or not. This feature of the act pervades and con-

demns the whole under the doctrine of *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441.

There are other features of the law which arrest our attention, but whether they are excessive interferences or not need not necessarily be decided, though we feel warranted in saying that if it were required to pass upon them the questions involved would be extremely difficult to solve in favor of the act. We will refer to a few of such features. There is a provision preventing the owner of a corner lot from using for his building more than eighty per cent. of the area, and of any other lot from using over sixty-five per cent.; a provision prohibiting transoms or movable sash and requiring in nonfireproof buildings in the stair halls fireproof self-closing doors and fixed iron sash filled with wire glass; a provision requiring, in the absence of a special permit to the contrary, all rooms to be whitewashed at least twice every year in particularly specified months; a provision prohibiting a person from permitting another not a member of his family to have the use of a room in his house for sleeping purposes without such house being classed as a lodging house and subjected to numerous and somewhat petty requirements as to such places, including the keeping of "a proper light" burning in the common hallway near the stairs upon the first and second floors from sunset to sunrise every night throughout the year and upon all other floors until ten o'clock in the evening unless officially otherwise directed. The extreme nature of that interference can only be appreciated by keeping in mind that it applies to every portion of the state and to every habitation where the proprietor allows even one person, not a member of his family, to have a sleeping apartment therein. Further, in this connection, it should be noted that every lodging house is required to have at least one water-closet. That, of course, means a water-closet such as is commonly constructed in dwelling houses in localities where there are water and sewer facilities rendering it prac-

ticable. So a person in any part of the state is prohibited from allowing another not a member of his family to have a sleeping apartment in his house unless the habitation is equipped with a water-closet. Further, there is an arbitrary requirement for rooms generally to be at least nine feet high in the clear,—that to apply, of course, to lodging houses as well as tenement houses; and the unusual height of rooms, as will be seen, is not to be restricted to the extent of the ordinary finish in such unpretentious buildings as are commonly constructed in the country and small communities. We note in this connection that the law the act was modeled after does not contain such severe provisions. The further provision should not be overlooked (sec. 1636—173), prescribing particularly how beds shall be located in a bedroom and requiring, generally, under all conditions, a person having a tenement or lodging house to consult and conform to such a petty requirement as that in case of his allowing two beds in a room they shall be so located as to have at least two feet on each side and receive direct light from windows unobstructed, such requirement to extend to any case where a person allows another not a member of his family to have a sleeping apartment in his house. How any one could expect that such a petty interference with individual rights could be squared with common sense in the light of a rational idea of the principles of civil liberty is not perceived. What good reason is there in classing every habitation regardless of character or locality, if at all, as a lodging or boarding house and to minutely, if at all, regulate its use, merely because of the proprietor or lessee permitting a person not a member of his family to have a sleeping apartment therein? We cannot imagine any.

There are other provisions that might be referred to which are worthy of some attention, especially in view of the general character of the act. Sufficient, however, has been said to indicate that it cannot stand and that in case of a further

effort to legislate in the same field the particular features condemned should be avoided and others should be studied with care; appreciating that lawmaking power is quite closely fenced about by wise limitations and must proceed, in the field of police regulation, reasonably at every step. Common sense as to reasonable requirements and reasonable means of securing such requirements should prevail, not the extreme views of well-meaning persons as to what is for the best. Idealists will often find efforts to force their standards of living upon people generally by legislation barred by constitutional limitations. An eminent author aptly said: "There is a wide interval between the ideal and the practical." If what is here said were not so, individual rights as to persons and property would be only such as sovereign power, acting through the legislature, might see fit to recognize, the inalienable rights commonly supposed to be sacred and inviolable would be changed into mere uncertain privileges, and regulation, so called, might easily become destructive of that which we have been wont to believe was essential to life, liberty, and the pursuit of happiness. It must be appreciated that "small limitations" as to the enjoyment of property, having regard to the nature of the case, measures the scope of police interference. Beyond that lies the broad field where the individual is sovereign so that it cannot be entered at all for private purposes, and as said in *Rideout v. Knox,* 148 Mass. 368, 19 N. E. 390, not for public purposes except by the power of eminent domain.

We may well point the last foregoing by quoting from *Ex parte Jentzsch,* 112 Cal. 468, 472, 44 Pac. 803, 804, this language:

"The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. . . . We give to the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of re-

sponsible judgment, not as a child in his nonage, and is left free to work out his destiny. . . . So while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant. . . . It is sought to uphold the law because 'it is a police regulation.' It is argued that 'the people have passed the law; let not the courts interfere with it. If the people are dissatisfied they may amend or repeal it.' "

We were favored with a similar argument in this case, but such arguments, of course, are of no avail.

In closing we should say we have examined with care all authorities and laws of a somewhat similar character to the one under consideration, cited to our attention, and extended our researches much further. It does not seem necessary to refer to such laws and authorities in detail. We have found nothing elsewhere out of harmony with the principles laid down in this opinion, and if it were otherwise it would not necessarily change the situation. No law similar to the one here, in many of the features, has been passed upon in the whole by any court, as regards its constitutionality. Particular features as to particular situations have been upheld in accord with principles here recognized, though expressions are found in some legal opinions not really necessary to the decisions reached rather more extreme than could meet with our unqualified approval.

From what has been said, the rule as to preserving parts of a law and condemning other parts where the latter are unconstitutional and are separable from the former does not apply to this case. There are several invalid features of the act, each of which pervades the whole, and, therefore, lamentable though it is that a manifestly laudable legislative purpose to promote the public welfare should wholly fail, all

portions of the act must be regarded as an entirety and share a common fate of being condemned as unconstitutional.

What has been said renders it unnecessary to discuss the motion made on behalf of appellants to dissolve the injunction granted by the circuit court and for an injunction and for a dismissal of the appeal. The act the appellants, representing the state, were enjoined temporarily and sought to be enjoined permanently from enforcing, being unconstitutional, the action must be regarded as against them in their individual capacities and not against the state. *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441. The motion, therefore, in all respects must fail for that reason and others indicated in the opinion.

By the Court.—The motion above referred to is in all respects denied with $10 costs. The order overruling the demurrer to the complaint and restraining the defendants pending the action is in all respects affirmed.

CASES DETERMINED

AT THE

August Term, 1908.

BELOIT, DELAVAN LAKE & JANESVILLE RAILWAY COMPANY, Appellant, vs. MACLOON and others, Respondents.

April 2—September 29, 1908.

Street and electric railways: Condemnation of streets for interurban road: Grant of "the use" of the street by city council: Dismissal of proceedings.

1. Under sec. 1863*a*, Stats. (Supp. 1906), giving to a street or electric railway corporation the right to condemn a street for the purposes of an interurban railway where *the use* of the street has first been granted to the company by a franchise duly passed by the city council, there can be no such condemnation where the only right which has been granted by the city council is a right to use the street for purely urban railway purposes.
2. If the proceedings in this case were brought to condemn the right to maintain an urban railway only on the street they were properly dismissed because no such condemnation is necessary.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This is a condemnation proceeding brought by a street and interurban electric railway company to condemn the interests of adjoining property owners in a street in the city of Janesville, and the company appeals from an order denying the application and dismissing the proceedings.

The condemnation petition was filed June 2, 1904. The respondents severally own certain lots on Wall and Franklin

streets in the city of Janesville, upon which streets the petitioner seeks to condemn a right to operate its railway. The railway was in fact laid in June, 1902, and has been since operated by the petitioner both as a street and interurban railway. The petition for condemnation alleged, among other things, that the petitioner was a street railway company duly incorporated under ch. 86, Stats. (1898); that by virtue of certain ordinances passed by the common council of the city of Janesville May 13, 1901, and May 12, 1902, the petitioner was granted a fifty-year franchise to construct, maintain, and operate "a street railway for the carriage of passengers" upon certain streets in said city, including the streets over which it seeks condemnation in this proceeding, and that it has constructed and now operates such street railway and has extended the same into the adjoining township of Rock to meet an extension of another street railway operated by it in the city of Beloit, thus forming an interurban connection between the two cities so that passengers from Beloit and other places are transported over its line into the city of Janesville; and further, that it intended to use the streets and property to be condemned for street railway purposes.

The respondents answered, denying that the petitioner had, either by its articles of incorporation or by either of the ordinances named in the petition, any authority to construct or operate any railway on the streets sought to be condemned, and further alleging that it did not operate a street railway, but a commercial railway for the carriage of passengers and baggage from Janesville to Beloit, Rockford, and other points, and that the streets sought to be condemned were not necessary for the operation of its railway.

Upon the trial the facts were stipulated in substance as follows: The petitioner was incorporated under ch. 86, Stats. (1898), in March, 1901, its business being to "construct, maintain, purchase, lease, and acquire a railway or railways

for the carriage of persons and property, including mail, express matter, baggage, freight, or any thereof, and the furnishing of light, heat, and power," and its location being at the city of Beloit. In August, 1901, it duly amended its articles of incorporation, and by such amendment declared that the purpose of the corporators was to form a corporation under ch. 86 and under secs. 1862, 1862*a*, 1863, 1863*a*, ch. 87, Stats. (1898), and the laws amendatory and supplemental thereto, "for the business and purpose of purchasing or otherwise acquiring, constructing, equipping, leasing, maintaining, and operating by electricity or other power a street railway for the transportation of passengers in the city of Beloit, county of Rock, state of Wisconsin, and elsewhere as it may by law be authorized to do, . . . and of acquiring, building, maintaining, operating, and using any street railways for the transportation of passengers or for the transportation of mail, express, merchandise and freight, or both or all, in any city, village, or town, and to extend its railway or railways from any point in one city, village, or town to, into, and through any other city, village, or town." Other purposes were also inserted which are unnecessary to be inserted here.

On the 12th of April, 1901, the petitioner applied to the city council of the city of Janesville for a franchise giving it the right to operate an *electric street* railway on certain named streets on the east side of Rock river, in said city, none of which streets intersected or connected directly with either Wall or Franklin streets. Said application was regularly published in all the daily issues of the Janesville Recorder, the official paper of Janesville, beginning April 13th and ending April 27th, except that it was not inserted in the issue of Sunday, April 14th. At a regular meeting of the council held April 29, 1901, proof of publication was filed, and the application was referred to a committee, which committee at the same meeting presented a report recom-

mending the passage of an ordinance granting petitioner the right to construct and operate an electric railway *for the carriage of passengers* upon certain named streets in the city on the *west* side of Rock river, thus making a complete change of route from one side of the river to the other. The council passed the ordinance recommended by the committee April 29th aforesaid. It was afterwards vetoed by the mayor, but passed over the veto May 13, 1901. This ordinance purported to give the railway company the right to construct a loop around one block bounded on the east by Franklin street, north by West Bluff street, west by Jackson street, and south by Wall street, and passing the premises of the respondents *Macloon* and *Murdock*. On May 12th another ordinance amending the first-named ordinance was passed, which gave petitioner the right to include another block in the loop, thus going one block further west and passing the premises of the respondent *Bronson,* and continuing to pass the premises of *Macloon* and *Murdock* in the same manner as before. No notice of application for the passage of the amended ordinance was published. Both ordinances were duly accepted by the petitioner.

On or about June 20, 1902, the petitioner began the construction of its railway on Wall and Franklin streets in front of the respondents' several lots, and on that day the respondents, by notice in writing, forbade the construction of the road, but the petitioner proceeded with and completed the road and extended it outside of the city to meet an extension of an electric railway owned by it extending to the cities of Beloit and Rockford, and began and continued to operate an electric interurban railway between the three cities for carriage of passengers and baggage, using the loop for the passage and turning of its interurban cars, and also transacting a city street railway business in Janesville over the same route and in the same cars. No direct action by *quo warranto* was ever commenced to contest the validity of

the said ordinances, but soon after the construction of the road the respondents commenced separate actions in equity to enjoin the construction and operation of the road, on the ground that it was an interurban railway and not a street railway, and the action of the respondent *Bronson* came to trial in the spring of 1904, and findings were made June 2, 1904, to the effect that the petitioner's railway constituted an additional burden upon the title of the owners of adjoining lots, which entitled them to compensation for the use of the street, and judgment was entered July 12, 1904, enjoining the petitioner from using the street for railway purposes, but providing that the enforcement of the injunction be temporarily suspended in order that petitioner might prosecute condemnation proceedings. The injunction actions brought by the respondents *Macloon* and *Murdock* are still pending.

The circuit court made findings of fact in accordance with the stipulated facts, and concluded that no application for the franchise containing the substance of the privileges asked for had been made as required by sec. 940*b*, Stats. (1898), and hence that the petitioner was not entitled to condemn, and dismissed the proceedings.

The cause was submitted for the appellant on the brief of *Thos. S. Nolan,* and for the respondents on that of *Charles E. Pierce* and *William Smith.*

The following opinion was filed June 5, 1908:

WINSLOW, C. J. Limited powers of condemnation have been given to street and electric railway companies by our statutes (sec. 1863*a*, Stats.: Supp. 1906), but with the proviso that such powers shall not apply to any city or village street, alley, or viaduct unless the use thereof shall first be granted to such company by a franchise duly passed by the governing body of the city or village. By sec. 940*b*, Stats. (1898), it is provided that no franchise shall be granted by

the governing body of any city or village until the application therefor containing the substance of the privileges asked for shall be filed with the village or city clerk and published in the official paper for not less than two weeks previous to action upon such application. The principal contention made by the respondents in the trial court and in this court was that this latter statute had not been complied with prior to the passage of the street railway franchise, because the application specified certain streets upon one side of the river as the streets over which a right of way was desired, while the ordinance as finally passed gave the company an entirely different route over certain streets upon the other side of the river. The trial court agreed with this contention and held that there had been no application filed or published containing the substance of the privileges asked for, and on this account denied the petition for condemnation.

The appellant strongly urges that the respondents cannot question in this proceeding the validity of the franchise on account of mere irregularities in its passage, because such question can only be raised at the suit of the state; and in support of this contention the appellant relies upon the case of *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57, and the cases which have followed and reaffirmed the doctrine there laid down. The appellant further contends that in any event the application was entirely sufficient under the statute, even if the question be one which can be raised in this proceeding. The arguments in support of these propositions are persuasively made, but we find it unnecessary to consider them because of the conclusions reached upon another and more fundamental question which is fairly presented by the record, but to which little attention has been paid. The petitioner is authorized by its articles of incorporation to build and operate interurban railways as well as purely urban or city railways. It is in fact operating an interurban railway business upon the streets in question, and, while its petition

alleges only its intention to condemn for street railway purposes, it is manifest that in fact it seeks condemnation in its character as an interurban railway and for interurban purposes alone, because no condemnation is either necessary or proper for purely city railway purposes. It has a franchise from the city to build and operate a city street railway, but none to build or operate an interurban railway. Does this satisfy the terms of sec. 1863*a*, Stats. (Supp. 1906), which only gives the right to condemn a street where the *use of the street* has first been granted to the company by a franchise duly passed by the city council? In other words, Can there be condemnation of a street for interurban purposes where the only right which has been granted by the city council is a right to use the street for purely city railroad purposes? The answer to this question depends, of course, upon the proper construction of the section named, and this depends largely upon the history of the section as well as of the exigencies which called it into existence.

It is well understood that this court early held that the ordinary street railroad carrying passengers alone did not constitute an additional burden on the fee of the street, and hence that it could be built and operated without condemning the rights of adjoining property owners. When, however, in the natural course of events, the interurban railway came into existence by a process of evolution and commenced to carry passengers from city to city, it was at once held that the use of highways for such purposes was an additional burden, for which the adjoining property owner must be compensated. *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561, 70 N. W. 678; *Zehren v. M. E. R. & L. Co.* 99 Wis. 83, 74 N. W. 538.

The course of the legislative evolution of the interurban railway as a corporation distinct from the true city street railway corporation was quite fully traced in the case of *Milwaukee L., H. & T. Co. v. M. N. R. Co.* 132 Wis. 313,

112 N. W. 663. In that case it was shown that the present interurban railway had its legislative origin in ch. 221, Laws of 1880, which authorized the formation of corporations for the building and operating by animal power of railways for the carriage of passengers or freight upon the highways of villages and towns, but not in cities. The various acts by which the rural railway or tramcar corporation was given greater powers (until by ch. 425, Laws of 1901, it was authorized to enter and operate its lines in cities as well as in villages and country towns, and thus became a fully developed interurban railway) were sufficiently noticed in that case and need not here be repeated. One feature of the legislation, however, which was not particularly significant in that case, but is so in the present case, remains to be noticed. Every act governing such corporations from the rural tramway act of 1880 up to and including the interurban act of 1901 made it an absolute essential that the consent of the local governing body should be obtained before the corporation could lay a foot of track or operate a car upon a street or highway. That this consent was not a consent to the building and operation of a mere street railway for the carriage of local passengers only, but a consent to the building and operation of a rural or interurban road for carriage of through passengers or freight, seems very certain. Any other construction of the requirement would seem absurd. When, therefore, the first act was passed granting limited powers of condemnation to both street and electric (or interurban) railway corporations (ch. 175, Laws of 1897; sec. 1863*a*, Stats. 1898), the interurban railway could use no highway until it had obtained the consent of the local government to use the same for interurban purposes. This first condemnation act forbade the condemnation of streets or alleys in cities, and the amending act of 1899 (Laws of 1899, ch. 306) contained the same limitation and extended it to village streets; but it was realized two years later that the

interurban railway, in order to perform its proper functions, must be clothed with the power to condemn the right to use city and village streets, and by ch. 465, Laws of 1901, sec. 1863*a*, Stats. (1898), was rewritten, and the provision forbidding the condemnation of city or village streets was amended by adding the words "unless *the use* of such street, alley or viaduct shall first be granted to such street or electric railway company by a franchise duly passed by the board of trustees or common council of such village or city."

Now the simple question is: What is the character of "the use" of a street which must first be granted to an interurban company before it can condemn? In view of the history of the legislation, and the fact that the law had always required that the consent which an interurban company must obtain from the local governing bodies was the consent to the use of a street or highway *for interurban purposes,* must it not be held that *"the use"* referred to in the last-named act was the same use consent to which the law had always required, namely, "the use" for interurban purposes, and this alone? It seems to us that this question must be answered in the affirmative. The fact that the same company may have been granted "the use" of the street for purely city street railway purposes cannot logically be held to meet the requirement that "the use" of the street must first be granted by the public authorities before condemnation for interurban purposes can be had. As well might it be claimed that a grant of "the use" of the street for the erection of poles and carrying of wires for an electric lighting system would satisfy the requirement.

The question has not been met before in this court. It doubtless might have been raised in the cases of *Abbott v. Milwaukee L., H. & T. Co.* 126 Wis. 634, 106 N. W. 523, and *Marsh v. Milwaukee L., H. & T. Co.* 134 Wis. 384, 114 N. W. 804, but in both these cases the right to condemn was not challenged, and hence the question before us in the pres-

ent case was waived. This construction is also in accord with the principles governing condemnation by general commercial railway companies, for these last-named companies acquire the right of condemnation only by virtue of their adoption of statutory articles of incorporation which under the statutes operate as a grant by the state to cross or occupy streets. The idea in both cases is that the grant of the public consent must precede the condemnation of the private interest. This seems entirely logical and eminently reasonable.

The necessary conclusion is that the judgment below was right. If, as alleged in the appellant's petition, this proceeding is brought to condemn the right to maintain and operate a city street railway only, then it was rightly dismissed because no such condemnation is necessary. If, on the other hand, it is brought to condemn the right to maintain and operate an interurban railway, it was rightly dismissed because the petitioner had never acquired from the common council the right to use the street for that purpose.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied September 29, 1908.

In re Horicon Drainage District: Appeal of Rottenberger and others.

April 3—September 29, 1908.

Drainage districts: Appealable orders: Proceedings continued under subsequent statute: Navigable waters: Rock river: Protection: Impairment: Riparian rights, etc.: Artificial pond or enlargement of river.

1. Under sec. 1379—17, Stats. (Supp. 1906; Laws of 1905, ch. 419, sec. 7), an order confirming the preliminary report of drainage commissioners is appealable.

2. Where proceedings to establish a drainage district had not been completed at the time of the enactment of ch. 419, Laws of 1905, it was proper, under sec. 35 of that act (sec. 1379—31*n*, Stats.: Supp. 1906), for the court to order that the further proceedings be had thereunder. Sec. 45 (sec. 1379—32*b*) is not applicable.
3. It is the policy of this court scrupulously to protect the navigable waters of the state from impairment.
4. Rock river is navigable in law and a public river of the state up to township 14, range 15. *State v. Carpenter*, 65 Wis. 165, limited and distinguished.
5. All waters declared navigable by act of the legislature must be regarded as navigable waters of the state and not subject to impairment under the drainage laws, at least in the absence of express legislative authority conferred upon the drainage commissioners in plain and unambiguous terms.
6. The "riparian rights, rights of flowage, and water powers" which, under sec. 1379—28, Stats. (Supp. 1906; Laws of 1905, ch. 419, sec. 18), may be taken under drainage proceedings, have reference to private rights and do not include rights of the public in navigable streams.
7. A pond or enlargement of a navigable river, created by a dam built across the river by authority of law, being at some seasons of the year several feet deep in places and capable of floating small craft and having existed in that condition for more than forty years, must be deemed a part of the navigable river, and drainage commissioners have no power, under existing laws at least, to destroy it.

MARSHALL and SIEBECKER, JJ., concurring, are of the opinion that, the artificial condition of the pond having become, in a legal sense, a natural condition and the title to its bed having passed to the state in trust for public purposes incident to navigable waters at common law, nothing should be said which might be construed as suggesting the existence of any power in the legislature to authorize the destruction of such pond.

BASHFORD and TIMLIN, JJ., dissenting, are of the opinion that neither the Rock river at the place in question nor the mill pond is navigable in fact, and that mere legal or artificial navigability is not sufficient to defeat the beneficent purposes of the drainage statutes.

APPEAL from an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

This is an appeal from an order in a proceeding to estab-

lish a drainage district in certain towns in Dodge county. The case was here before on appeal from an order appointing commissioners (*In re Horicon D. Dist.* 129 Wis. 42, 108 N. W. 198), which order was made before the passage of ch. 419, Laws of 1905 (secs. 1379—11 to 1379—32*b*, Stats.: Supp. 1906). After the proceeding was remanded the court ordered that further proceedings be had under ch. 419, Laws of 1905, and that the commissioners make a further report to the court as directed by the order. The commissioners made and filed such report, which was confirmed, and this appeal is from the order of confirmation.

In the order appealed from the court found, among other things, that the benefits from the works proposed by the commissioners will exceed the damages and cost of construction; that the proposed work will not affect the public health; that said proposed work will promote the public welfare; that in 1837 Rock river, which flows through the proposed drainage territory, was meandered by the surveyors of the United States government; that the Hustisford pond was created by the erection of a dam across Rock river at Hustisford, which caused the banks of said river to overflow, thereby creating a reservoir of water for hydraulic purposes, and that said mill pond has been maintained by the owners and those interested in water power, and that it was built pursuant to an act of the council and house of representatives of the territory of Wisconsin for the year 1845; "that no part of Rock river within said district is in fact navigable or has ever been navigable or used for any of the purposes of commerce."

The court further ordered that the reports of the commissioners be confirmed in all respects, and directed that the commissioners proceed with the work, and ordered the boundaries proposed in the reports fixed and approved as the boundaries of the drainage district established, and that such district be organized under the name of "the Horicon drain-

age district." The remonstrants filed exceptions to the findings and order of the court.

The appellants assign the following errors: (1) The court erred in ordering further proceedings to be had under ch. 419, Laws of 1905. (2) The court erred in finding that the drainage scheme will promote public welfare. (3) The court erred in confirming the reports, because the drainage laws do not contemplate or authorize such an unreasonable exercise of police powers. (4) The court erred in finding that no part of Rock river is in fact navigable or has ever been navigable or used for any of the purposes of commerce. (5) The court erred in finding that Hustisford Lake was not a navigable lake and was not to all intents and purposes a natural lake.

For the appellants there were briefs by *Lamoreux & Husting,* and oral argument by *C. A. Lamoreux, Paul O. Husting,* and *M. E. Burke.*

J. E. Malone, for the respondent petitioners.

C. E. Hooker, for the respondent commissioners.

The following opinion was filed April 17, 1908:

KERWIN, J. 1. Counsel for respondents claim that the appeal should be dismissed on the ground that the order is not appealable. As we understand their contention, it is based largely upon the assumption that the drainage law, secs. 1379—11 to 1379—32*b*, Stats. (Supp. 1906; Laws of 1905, ch. 419), does not contemplate or authorize an appeal from the order confirming the preliminary report, and that such order is not one of the appealable orders provided for in sec. 3069, Stats. (1898), relating to appeals from orders. The principal argument seems to be that the appeal is not given by sec. 3069, Stats. (1898). We fully agree with counsel that the appeal is not given by force of sec. 3069, Stats. (1898), but we think it is given by the special provisions of the drainage law. It is said by counsel that by

consulting sec. 8, ch. 419, Laws of 1905, it will be found provision is there made for another report; hence the order confirming the preliminary report provided for in sec. 7 is not appealable. This would undoubtedly be true under the decisions of this court if no appeal were given from the order confirming the preliminary report. Such was the effect of our decision on the former appeal in this case. We held that there being no authority in the drainage act for appeal from the order appointing commissioners, and the order not coming within the general class of orders made appealable by sec. 3069, Stats. (1898), it was not appealable. *In re Horicon D. Dist.* 129 Wis. 42, 108 N. W. 198. It is true, as insisted by counsel, the right of appeal from orders is statutory, but here the statute (sec. 7, ch. 419, Laws of 1905) expressly provides for an appeal from the order confirming the preliminary report, and provides that the findings and order shall be final and conclusive unless appealed from to the supreme court within thirty days after filing thereof. So under the express provisions of the statute we see no escape from the conclusion that the order is appealable.

2. We think no error was committed in ordering further proceedings to be had under ch. 419, Laws of 1905. True, the petition was filed under the law as it stood prior to the passage of said ch. 419. Under the express provisions of this chapter, however, where the proceedings to establish a drainage district have not been completed, they may be carried on to completion under the new law in case the court shall so order. In the case before us the court did so order after the passage of the new law. Sec. 35, ch. 419, Laws of 1905, provides, in substance, that where drainage districts are in process of organization under the statutes "as they have heretofore existed," said organization shall be perfected under the laws as they theretofore existed, unless the court otherwise orders; but after said organization is complete and corporate authority acquired all further proceedings shall

be had under such act where there is any section of the act to apply to such proceedings. Appellants lay considerable stress on the provision found in sec. 45, which is as follows:

"Where any suit or proceeding shall be pending to determine the validity of any proceeding heretofore had, or which shall have been prosecuted to judgment adverse to such proceedings under the provisions of the statutes in this section mentioned, the provisions of this act shall not apply or in any way affect."

But it will be seen by reading the whole section that this has no application to proceedings to establish drainage districts while in process of organization. We understand there is no dispute but that the proceedings taken after the determination of the appeal to this court were carried on under ch. 419, Laws of 1905, by order of the court, and we think properly so.

3. The fourth assignment of error, to the effect that the court erred in finding that no part of Rock river is in fact navigable, is the important question on this appeal. That Rock river is a navigable stream in so far as the question of navigability is here concerned must be regarded as settled by legislation, state and national, and the decisions of this court. Ordinance of 1787, art. 4; Local Acts Wis. 1839, No. 49, sec. 4 (p. 99); sec. 1607, Stats. (1898); *Wood v. Hustis,* 17 Wis. 416; *Willow River Club v. Wade,* 100 Wis. 86, 111, 76 N. W. 273; *Smith v. Youmans,* 96 Wis. 103, 70 N. W. 1115; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Rossmiller v. State,* 114 Wis. 169, 89 N. W. 839; *Diana S. Club v. Lamoreux,* 114 Wis. 44, 54, 89 N. W. 880; *In re Dancy D. Dist.* 129 Wis. 129, 108 N. W. 202. It is established that Rock river was meandered by the United States government surveys as far north as the north line of township 11 north, range 16 east, and by our statute (sec. 1607) declared navigable up to township 14, range 15, but

it is argued that the Local Acts of Wisconsin of 1839, before referred to, do not declare Rock river navigable, but provide:

"The Rock river is hereby declared to be a public highway and forever free for the passage of boats, barges, canoes, rafts, or other crafts capable of navigating said river, as high up said river as township 14 in range 15."

This is a declaration that the river is navigable, and so held by this court in *Wood v. Hustis,* 17 Wis. 416. Considerable stress is placed on *State v. Carpenter,* 68 Wis. 165, 31 N. W. 730, but that case recognizes the navigability of Rock river under the Ordinance of 1787, the constitution, and many laws of the state, and says:

"This court is bound to take judicial knowledge that it is a navigable stream and public river of this state; and that it is unlawful to obstruct it there can be no question. The public and all persons have the right to its free and unobstructed use for the purposes of navigation at all times and under all circumstances."

There is in the opinion, however, other language tending to convey the idea that, although the river had been at an early date navigable in fact, it had ceased at the point in question to be practically navigable. When, however, the opinion is confined to the facts of the case, it will be found inapplicable here. We do not regard it necessary to go into the question of whether Rock river is in fact navigable. It was declared navigable by legislative authority; therefore must be treated as one of the navigable streams of the state in carrying out the provisions of the drainage law. The policy of the legislature of this state has been to preserve navigable waters of the state from impairment, and this court has held it the duty of the legislature to do so. *In re Horicon D. Dist.* 129 Wis. 42, 108 N. W. 198, and cases cited. So, in view of the history of legislation upon the subject, we think it plain that all waters declared navigable by act of the legislature must be regarded navigable waters of

the state and not subject to impairment under the drainage laws, at least in the absence of express authority conferred upon the drainage commissioners, if, indeed, the legislature has power to confer authority to impair navigable waters or the common-law incidents of navigation. The policy of this court as shown by a long line of decisions has been to scrupulously protect the navigable waters of the state from impairment. *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661; *Willow River Club v. Wade,* 100 Wis. 86, 111, 76 N. W. 273; *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Rossmiller v. State,* 114 Wis. 169, 89 N. W. 839. If it were necessary to go into the question of whether Rock river is in fact navigable, we think it would be difficult to sustain the finding of the court below to the effect that it is not, upon the facts established and the repeated decisions of this court. But we shall not review the evidence or consider that question, since we are of opinion that Rock river is navigable in law.

Having determined that Rock river is navigable, the next question is, Does the drainage law authorize its impairment? The power conferred upon drainage commissioners under sec. 1379—22, Stats. (1898), was the same as the power given them under sec. 18, ch. 419, Laws of 1905. And it will be seen that no authority is conferred upon them to appropriate or impair navigable waters under such law. If the legislature has the power in any case to authorize the commissioners to appropriate or impair navigable waters, the authority must be conferred in the most plain and unambiguous terms. *Winchell v. Waukesha,* 110 Wis. 101, 108, 85 N. W. 668. No express authority is given to appropriate navigable waters, but it is argued that the authority contained in sec. 18, ch. 419, Laws of 1905, to the effect that "riparian rights, rights of flowage and water powers" may be taken under the drainage proceedings, affords authority

for respondents' contention here. But we think it clear that riparian rights, rights of flowage, and water powers referred to have reference to private rights, and not rights of the public in navigable streams.

The proposed scheme of drainage embraced within the limits ordered contemplates the destruction of Hustisford dam, built across Rock river by authority of law more than forty years ago, and which has since maintained a pond or enlargement of the river covering a large tract of land, and which pond at some seasons of the year is covered with several feet of water at some places and capable of floating small craft. The court below found that no natural lake or pond existed within the limits of the drainage district established by the order, because, while the river was meandered by public authority, the pond had not been, and that the meandered limits of the river did not show a lake or pond. As before observed, however, it is established that this lake, pond, body of water, or enlargement of the river (we do not think it material which) existed for more than forty years before this proceeding was commenced and was during that time and is a part of Rock river. By the proposed scheme it will become necessary to destroy it and decrease the volume of water in the river and otherwise materially alter the physical condition of the river, and impair, if not destroy, many of the common-law incidents of navigation. This, we think, the commissioners, under existing laws at least, have no power to do. *Willow River Club v. Wade,* 100 Wis. 86, 111, 76 N. W. 273; *Rossmiller v. State,* 114 Wis. 169, 89 N. W. 839; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185; *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661; *In re Dancy D. Dist.* 129 Wis. 129, 108 N. W. 202.

Many other questions are discussed with much learning and ability, but in the view we take of the case it is unnec-

essary to consider them. We hold that Rock river is a navigable stream, and that no authority of law was delegated to the commissioners to impair it or appropriate it to drainage purposes, and that the drainage district ordered will have that effect. It follows, therefore, that the order appealed from must be reversed.

By the Court.—The order of the court below is reversed, and the proceeding remanded with directions to dismiss the petition.

MARSHALL, J. (*concurring*). I concur in the decision in this case and the opinion so far as it goes, but would be better satisfied if the result were placed on a broader foundation.

There may be some question, though I think it is properly resolved in appellants' favor, as to whether the drainage scheme will injuriously affect the navigability of Rock river proper. If it be a fact that such scheme would increase the amount of water in the river, the decision would be somewhat illogical. There can be no question whatever but that the execution of the plan proposed would destroy the artificial expansion of water known as Hustisford Lake, which it appears from the evidence is navigable under the settled law of this state.

Now the artificial condition of the lake having existed for over twenty years—some fifty years in fact,—it has become, in a legal sense, a natural condition. The body of water is subject to the same rules as those governing lakes such as Lake Winnebago, the lakes around the city of Madison, or any of the well-known navigable lakes of the state. The title to the bed long ago passed from private to public ownership. It passed under the great trust vested in the state for public purposes incident to navigable waters at common law, which trust, as it has been said, the state is powerless to abdicate. *Smith v. Youmans,* 96 Wis. 103, 70 N. W. 1115;

Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436. That principle is of inestimable value to the people. It should be vindicated upon all proper occasions. While the reclamation of waste land is important the preservation of the navigable waters of the state, as a matter of public policy, is of paramount importance. It were better to create more inland bodies of navigable water than to destroy those we have, even if the right of destruction exist.

This case goes upon the ground that the injurious interference with navigable water is, at least, of such doubtful policy that nothing short of unmistakable language in a legislative enactment authorizing the same should be held to have been so intended, and applying that to the law in question no such intention is expressed. There is no need for going further, but it is proper to say in passing that whether the legislature could authorize the destruction of a navigable lake is so very doubtful that it were better not to say anything liable to be construed as suggesting the existence of such power. Generally speaking, a trustee can never rightfully destroy the subject of the trust even by the consent of the *cestui que trust* if thereby the dominant purpose of the donor would be defeated. Why the great trust under which the public waters of the state are held is not governed by that rule is difficult to perceive.

The most significant reason in my judgment why the drainage scheme in question is not legitimate is that it contemplates the destruction of a navigable lake.

SIEBECKER, J., concurs in the foregoing opinion by MARSHALL, J.

BASHFORD, J. (*dissenting*). I concur in the opinion of the court that the proceeding was properly continued under ch. 419, Laws of 1905, and is governed by the provisions of

that act, and that the order before us is appealable under sec. 7 of that act. The drainage scheme can be maintained on the ground that it would promote the public welfare, although the public health is not directly affected. The trial court found upon the evidence that the Rock river within the limits of the drainage district was not navigable. This is a question of fact, and, in the absence of any finding by the trial court, I should reach the same conclusion from the testimony. The trial court also found that the Hustisford mill pond was not navigable, and that finding in my opinion is fully supported by the evidence. I consider mere legal or artificial navigability not sufficient to defeat the beneficent purposes of these drainage statutes.

TIMLIN, J., concurs in the foregoing opinion by BASHFORD, J.

The respondents moved for a rehearing both in this and in the following case.

In support of the motion there was a brief by *Thomas M. Kearney,* of counsel, *J. E. Malone,* attorney for the petitioners, and *C. E. Hooker,* attorney for the commissioners.

For the appellants, in opposition to the motion, there was a brief by *Lamoreux & Husting.*

The motion was denied September 29, 1908.

IN RE HORICON DRAINAGE DISTRICT: APPEAL OF KOCH.

April 3—September 29, 1908.

In re Horicon Drainage District, ante, p. 227, followed.

APPEAL from an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

For the appellants there were briefs by *Lamoreux & Husting,* and oral argument by *C. A. Lamoreux, P. O. Husting,* and *M. E. Burke.*

J. E. Malone, for the respondent petitioners.

C. E. Hooker, for the respondent commissioners.

The following opinion was filed April 17, 1908:

KERWIN, J. This case is ruled by *In re Horicon Drainage District: Appeal of Rottenberger, ante*, p. 227, 116 N. W. 12. Therefore the order appealed from must be reversed.

By the Court.—The order of the court below is reversed, and the proceeding remanded with directions to dismiss the petition.

A motion for a rehearing was denied September 29, 1908.

FRANZEN and another, Appellants, vs. HAMMOND, Respondent.

April 18—September 29, 1908.

Usury: Agency: Exaction of bonus from borrower: Presumption of knowledge by lender: Scope of agency: Ratification.

1. The fact that the lender's son, who acted as her agent in making a loan of money, did not receive any compensation from her, did not raise a conclusive presumption that she knew he exacted from the borrower a commission in addition to lawful interest for the loan.
2. The exaction, by the lender's agent from the borrower, of a commission or bonus for himself, which, with the interest charged, exceeds the lawful rate of interest, does not make the loan contract usurious as to the lender, if such exaction was without his participation or knowledge.
3. The exaction of usury is not within the apparent scope of an agency to make loans.
4. The receipt by the lender of a security regular upon its face, and assertion of a right to enforce it according to its tenor, do not constitute ratification of any act of the lender's agent in violation of law.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action to set aside and cancel a mortgage on the ground that the same was tainted with usury and before the commencement of the action plaintiffs duly tendered to the de-

fendant the entire sum to which she was entitled. The issues were decided thus: April 14, 1905, plaintiffs gave defendant their note secured by mortgage for $790, due one year from date with eight per cent. interest per annum. April 30, 1906, plaintiffs duly tendered in payment of said note $750 and demanded a satisfaction of the mortgage. The loan was made through a son of defendant who had authority to make loans for her and draw checks therefor on her bank account. He received no compensation from her for his services and was responsible for all loans he made. He took from plaintiffs the note and mortgage in question for the defendant, giving two checks on her account signed by him as agent, one for $750 and one for $40, the last of which was duly indorsed and given back to the agent. She had no further knowledge of the transaction than that her son accounted to her for $790 drawn from her bank account, by delivering the note and mortgage. She did not make or authorize an usurious contract.

Upon such facts the conclusion was reached that plaintiffs were not entitled to recover. Judgment was entered accordingly in defendant's favor.

For the appellants there was a brief by *O. G. Erickson,* attorney, and *Max H. Strehlow,* of counsel, and oral argument by *Mr. Erickson.*

Orlando E. Clark, for the respondent.

The following opinion was filed May 8, 1908:

MARSHALL, J., We are unable to discover any warrant for disturbing the findings of fact. The only question raised in regard thereto is whether respondent knew her son exacted from the borrower a sum of money in addition to lawful interest for the loan and retained the same as compensation for his services. The direct evidence is to the effect that she had no such knowledge, but the claim is made that from the circumstance of the agent not receiving compensation from

the lender, a presumption arises that she knew he received such from the borrower, and many authorities are cited to that effect. None of them hold that such circumstance is more than evidentiary. Where it is of such probative character as to create a presumption of knowledge it is subject to be rebutted, as it was sufficiently in this case to warrant the finding. Because of the relationship existing between respondent and her agent, he being her son, it was most natural that she did not expect to pay him any pecuniary consideration for his services nor suspect that he would receive any secret benefit from handling her money; that she trusted him to conduct her business in consideration of their relationship.

Rogers v. Buckingham, 33 Conn. 81, is a good illustration of many cases that might be cited supporting the suggestion that the presumption referred to, when it arises, is merely one of fact which yields readily to evidence showing the contrary. The court said:

"It may be presumed where the agency is general, and embraces the business of making, managing and collecting the loans of a monied man" and he makes an usurious loan, that it was authorized by the lender. "But it is a presumption of fact and may be rebutted. . . ."

The presumption did arise in that case, but it was held rebutted by circumstances authorizing a finding that the action of the agent was unauthorized and that the exaction of the excessive amount for the use of the money was for his benefit only and must have been so understood by the borrower.

It is useless to review the many cases cited where it has been held that the exaction of a bonus by the agent of the lender which, with the interest charged, exceeded the lawful rate of interest, rendered the transaction usurious. None of them involved exactly such circumstances as characterized this case. In substance, all of the excessive exactions though ostensibly as commissions were in fact cloaks for the real purpose of obtaining more than legal interest for the money.

The proposition submitted here is this: If a person intrusts another with money to loan and such other lends the same, charging and receiving from the borrower a sum of money in addition to legal interest as compensation for his services, but without any direction by or knowledge of the lender, is the contract between the lender and borrower tainted with usury?

The cases cited to our attention to support the affirmative do not seem to be in point. In *Kemmitt v. Adamson,* 44 Minn. 121, 46 N. W. 327, the lender actually participated in the transaction. In *Avery v. Creigh,* 35 Minn. 456, 29 N. W. 154, the agent was expressly authorized to make all he could for himself out of the borrower and pursuant thereto he charged and received a sum in excess of a reasonable commission. In *Joslin v. Miller,* 14 Neb. 91, 15 N. W. 214, the agent and the lender shared in the exaction which in the whole added to the interest agreed upon in the note was excessive. In *Stephens v. Olson,* 62 Minn. 295, 64 N. W. 898, the principal had the benefit, though without his knowledge, of the excessive charge. It was included in the note and the lender, after learning of the fact, ratified the agent's act by insisting upon payment of the note as written. In *Meers v. Stevens,* 106 Ill. 549, it was found as a fact that the transactions of the agent were resorted to for the very purpose of circumventing the usury law.

All the other cases referred to by appellants' counsel outside of this state are similar to those we have mentioned, except *Austin v. Harrington,* 28 Vt. 130, and one or two others of that class, holding that where one makes another a general agent for the loaning of money he is bound by all such other does within the apparent scope of the agency, though he has no knowledge thereof, and that such apparent scope includes the charging of a commission so large as to render the contract usurious. There are two lines of cases on the subject, one holding that the making of usurious loans is not within

the apparent scope of a general agency to loan money, and it seems that such is the better rule. The following belong to such class: *Condit v. Baldwin,* 21 N. Y. 219; *Estevez v. Purdy,* 66 N. Y. 446; *Rogers v. Buckingham,* 33 Conn. 81; *Gokey v. Knapp,* 44 Iowa, 32; *Muir v. Newark Sav. Inst.* 16 N. J. Eq. 537; *Conover v. Van Mater,* 18 N. J. Eq. 481; *Manning v. Young,* 28 N. J. Eq. 568; *Stillman v. Northrup,* 109 N. Y. 473, 17 N. E. 379; *Baldwin v. Doying,* 114 N. Y. 452, 21 N. E. 1007.

The rule laid down in *Condit v. Baldwin, supra,* is followed in all of the cases cited and with few exceptions has been adopted by the courts of this country. It is stated thus:

If "an agent intrusted with money to invest at legal interest" exacts "a bonus for himself as the condition of making a loan, without the knowledge or authority of his principal," such circumstance does "not constitute usury in the principal nor affect the security in his hands."

The court said, in effect, that it is only where the agent of the lender takes a sum in excess of legal interest under such circumstances that the sum so taken can be considered as obtained in whole or in part for the lender that the contract is tainted with usury, and even in that case it is not so tainted unless the lender knows of the taking and ratifies it; that when the sum taken is for the agent exclusively and so understood by the borrower there is no taint of usury; that acceptance of the note by the lender and assertion of a right to recover thereon according to its terms, only ratifies the contract as expressed in the paper.

The doctrine above stated seems to be sound. It is not within the apparent scope of a legitimate business agency to violate the law. So where an agent loans money, exacting a bonus for himself, the presumption is rather that it is without the knowledge of the principal than with such knowledge. It logically follows that the circumstance of a principal accepting securities from his agent covering the exact amount

of money loaned and showing on their face that the loan was legitimate and insisting upon enforcing the same after obtaining knowledge of the excess the agent charged solely for his own benefit, does not make the transaction as to the lender usurious. A very large array of authority to that effect is found cited to the text of Webb, Usury, at sec. 93, and Tyler, Usury, at page 170.

The latter author, after reviewing the authorities and particularly *Austin v. Harrington,* 28 Vt. 130—one of the few cases out of harmony with the foregoing,—said:

"The doctrine is well settled, and universally recognized, that an agent may lawfully take a reasonable commission or bonus from the borrower for his expenses and services in effecting a loan; and whenever the lender is not a privy to the arrangement between the borrower and the agent or in no way participates in the commission or bonus, the transaction will be regarded as free from the taint of usury. . . . If an agent, in making a loan of money, accepts from the borrower a bonus beyond the legal rate of interest, such act of the agent will not render the contract usurious, if the bonus was taken without the knowledge of the principal, and was not received by him."

That is stated as the law declared in New Jersey, New York, and elsewhere.

The same subject was treated in *Acheson v. Chase,* 28 Minn. 211, 9 N. W. 734, the court holding under circumstances similar to those here that the contract was not tainted with usury, and that in such a case the exaction of the bonus and receipt of the same was not within the apparent scope of the agency contract and so not ratified by the lender's insisting upon the validity of the securities according to their tenor after obtaining knowledge of the fact.

But counsel for appellants contend that this court is committed to the very limited line of authorities not in harmony with what has been said, of which *Austin v. Harrington,*

supra, is a good sample. Such is not the opinion of the court.

In *McFarland v. Carr*, 16 Wis. 259, the agent made the loan under directions of the lender and received the bonus, not as his own, but as the money of his principal. The court distinctly held that in such circumstances as we have here the contract would not be tainted with usury. The case was distinguished from those we have cited, particularly *Condit v. Baldwin*, 21 N. Y. 219. The ground of the decision is stated in these words: "We must assume that Warden, in making the loan and exacting the payment of the $50, acted as agent of McFarland" (the lender). If that were so no one will contend that the contract was not usurious. In this case it must be kept in mind though respondent's son acted as her agent, he did not as such agent exact the bonus. He exacted it independently of his agency. He demanded it not for his principal, but for himself as the court found.

In *Ottillie v. Wæchter*, 33 Wis. 252, the agent acted solely for the borrower and it was held that in such a case the exaction by the agent from his principal, with knowledge of the lender, of a bonus does not constitute usury. *McFarland v. Carr, supra*, was referred to inadvertently, in a way to indicate that its scope is other than that which we have stated as to the circumstance being that the exaction was with the knowledge and by the direction of the principal. *Condit v. Baldwin, supra*, was referred to and the rule thereof stated without approval or disapproval.

It is the opinion of the court that *Condit v. Baldwin* states the true rule, so far as it holds that the exaction by the agent of a lender, without his knowledge or participation, of the borrower of a sum as commission for doing the business, such exaction being a private matter between the agent and the borrower, does not make the loan contract as to the lender usurious; that it is not within the apparent scope of such an agency to violate the law, and that the receipt by the lender

of the security, regular upon its face, and assertion of a right to enforce it according to its tenor, does not constitute ratification of any act of the agent in violation of law. The result is that the judgment must be affirmed.

By the Court.—So ordered.

A motion for a rehearing was denied September 29, 1908.

FALLON, Appellant, vs. VANDESAND, Respondent.

April 20—September 29, 1908.

Gifts: Evidence: Declarations of donor: Promise to repay: Burden of proof: Payment: Instructions to jury: Immaterial error.

1. In an action upon an alleged express contract by defendant to repay the amount of a surgeon's bill paid by plaintiff for an operation on his daughter, defendant's wife, a declaration by plaintiff, in conversation with a third person about ten days before the payment was made, that he was to pay for the operation because defendant had had expense enough, was admissible to show that the money was paid by plaintiff as a gift.
2. The burden of proof was upon the plaintiff in such case with reference to the request for the loan and the promise of repayment.
3. It was error in such case to instruct the jury that the burden was upon plaintiff to show that there had been no repayment, but there being no issue as to repayment raised by the pleadings or evidence, and no claim that the money had been repaid, the error was not prejudicial or material.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Fish & Storms,* and for the respondent on that of *Louis H. Rohr* and *Simmons, Nelson & Walker.*

For the appellant it was contended, *inter alia,* that the

court below erred in submitting to the jury the issue of payment, and further erred in placing the burden of proof as to that issue upon the plaintiff. *Kuenster v. Woodhouse,* 101 Wis. 216, 77 N. W. 165; *Knapp v. Runals,* 37 Wis. 135; *Studebaker Bros. Mfg. Co. v. Langson,* 89 Wis. 200, 61 N. W. 773.

Among other references upon the part of the respondent were the following: 20 Cyc. 1222; *Pritchard v. Pritchard,* 69 Wis. 373, 34 N. W. 506; *Miller v. Clark,* 40 Fed. 15; sec. 2829, Stats. (1898); *Schmeckpepper v. C. & N. W. R. Co.* 116 Wis. 592, 93 N. W. 533; *Jackson v. State,* 91 Wis. 253, 64 N. W. 838; *Williams v. Hoehle,* 95 Wis. 510, 70 N. W. 556; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Abbott v. Milwaukee L., H. & T. Co.* 126 Wis. 634, 106 N. W. 523.

The following opinion was filed May 8, 1908:

TIMLIN, J. In this action to recover $200 for money loaned, the jury returned a verdict for defendant. Defendant's wife was dangerously ill, a surgical operation was necessary, and the plaintiff, her father, paid the surgeon's bill of $200. Plaintiff claimed an express contract on the part of defendant to repay this sum, and the defendant contended that the money was paid by the plaintiff as a gift or gratuity for the benefit of his daughter. The case was not presented in the trial court nor in this court upon any claim that the money so paid partook of the legal quality of necessaries furnished to or for the defendant's wife. But it is contended that upon the issues as submitted the court erred in admitting the testimony of one Reed regarding a conversation with the plaintiff, had about ten days prior to the transaction in question, in which conversation the plaintiff stated that he was to pay for the operation because the defendant had had expense enough. We think the testimony was competent, within the rule of authorities cited in 20 Cyc. 1222.

It is next contended that the court erred in its instructions to the jury. The charge was in these words:

"If you are satisfied by a fair preponderance of all the credible evidence in the case that the plaintiff paid the money in question for the defendant, that the defendant promised to repay it on demand, that demand for repayment has been made and that repayment has not been made, you will return a verdict for the plaintiff. If you are not so satisfied, you will return a verdict for the defendant. As I said before, the burden rests upon the plaintiff to satisfy you as to the truth of his contention."

Under the theory upon which the case was tried and submitted by both parties it was not error to place the burden of proof upon the plaintiff with reference to the request for the loan and the promise of repayment. It was error, however, to instruct the jury that the burden of proof was on the plaintiff to show that payment had not been made. But there was no issue of payment raised by the pleadings or the evidence, and no claim that the money in question had been paid by the defendant or by any person for him. Consequently the error last noticed was not prejudicial or material. Sec. 2829, Stats. (1898); *Studebaker Bros. Mfg. Co. v. Langson,* 89 Wis. 200, 61 N. W. 773; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424.

By the Court.—The judgment of the circuit court is affirmed.

A motion for a rehearing was denied September 29, 1908.

EASTERN RAILWAY COMPANY OF MINNESOTA, Respondent, vs. McCORD and another, Appellants.

May 8—September 29, 1908.

Railroads: Condemnation of land: Conditions precedent: Statutes: Certificate of Railroad Commission: Construction of part of line.

1. The provision of sec. 1831, Stats. (1898), making it a condition precedent to the right to condemn land for a proposed extension of a railroad that the route of such extension shall be designated by resolution of the board of directors of the railroad company, is not abrogated by ch. 454, Laws of 1907, providing for the obtaining from the Railroad Commission of a certificate of convenience and necessity.
2. A certificate by the Railroad Commission to the effect that public convenience and necessity require the construction of a railroad between certain specified points and that the Commission has authorized its construction, and "that the portion thereof covered by this certificate is" a small part only of the line between the points named, is contradictory and void. No power is given to the Commission by sec. 1797—51, Stats. (Laws of 1907, ch. 454), or otherwise, to authorize the building of a part only of a railroad which it has certified to be required by public convenience and necessity.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

A proceeding, upon the petition of the *Eastern Railway Company of Minnesota,* to condemn lands for its use as a railroad. A portion of the lands so sought to be acquired front on St. Louis Bay, which is connected with Lake Superior. The petition alleges that the railway company has complied with the conditions imposed by statute to entitle it to condemn lands for its use in conducting its transportation business in this state; that it is building an extension of its railroad; that it needs these lands for such extension of its main line, and for yards, stations, sidetracks, buildings, and building grounds, and to make connection with other railroads; and that it intends in good faith to use these lands for

such railroad purposes. It is also averred that it has theretofore made application to the Railroad Commission of Wisconsin and taken such steps as authorize the Commission to determine the question of the public convenience and necessity of constructing the proposed extension of its railroad, and that such Commission has issued to it a certificate that public convenience and necessity require the construction of the extension of its railroad, and has authorized its construction over the following line:

"Commencing at the bridge of the Duluth & Superior Bridge Company, which connects Rice's Point in the state of Minnesota with Connor's Point in the state of Wisconsin, thence in a general easterly direction down the bay shore of the Bay of Superior and terminating at or near Pouilliot avenue in the town site of Middleton, city of Superior, and that the portion thereof covered by this certificate is between said Pouilliot avenue and E street in Roy's addition to the city of Superior, as shown by map attached to said application, marked 'Exhibit 3,' and now on file with this Commission."

It appears that the company has surveyed other proposed extensions which connect with its existing line of railroad, but no other steps have been taken to establish and construct such proposed extensions. The line of the proposed extension covered by the certificate of the Railroad Commission has no direct physical connection with petitioner's route as heretofore constructed by it. The board of directors of the petitioner has not passed, as prescribed by statute, a resolution designating the route of its proposed extension, either of the part embraced in the certificate of the Railroad Commission or of the parts which it has surveyed and proposes to construct.

The circuit court found that the petitioner had complied with the conditions precedent to entitling it to condemn the land over the route as located in the Railroad Commission's certificate of convenience and necessity and which it seeks

to secure for its railroad, appointed commissioners to ascertain and appraise the compensation to be made to the owners and persons interested in the real estate described in the condemnation, and to perform the duties imposed on them by law. This is an appeal from such order.

For the appellants there was a brief by *Luse, Powell & Luse,* attorneys for *McCord,* and by *J. B. Arnold & E. A. Arnold,* attorneys for *Hibbard,* and the cause was argued orally by *L. K. Luse.*

J. A. Murphy, for the respondent.

The following opinion was filed June 5, 1908:

SIEBECKER, J. The appellants, as owners of land which petitioner seeks to condemn for railroad uses, aver that petitioner is not authorized to take their lands for railroad purposes, because it has not complied with the statutory requirements to entitle it to exercise the right of eminent domain. They aver that petitioner has not, by resolution of its board of directors, designated the route of the proposed extension of the railroad, as prescribed by the statute (sec. 1831, Stats. 1898). The statute provides that to authorize petitioner to extend its road from any point named in its charter or articles of organization this step shall be taken by the board of directors. The railroad company denies that this is a necessary condition precedent and asserts that this requirement is abrogated by the provisions of ch. 454, Laws of 1907, regulating the construction and operation of railroads. It is contended that this chapter (ch. 454, Laws of 1907) supplants and abrogates the section requiring that the route of a proposed extension shall be designated by resolution of the board of directors, entered of record, and filed with the secretary of state, and that the construction of branches and extensions of railroads is now wholly controlled by the provisions of this chapter. This chapter does not specify the steps to be taken in place of the requirements imposed on railroad companies

by secs. 1831 and 1820, Stats. (1898), by which the railroad company declares its purpose to construct extensions or branches and secures certain rights and privileges. True, ch. 454, Laws of 1907, enacts that no railroad company shall exercise the powers conferred by law, or begin the construction of a line of railroad as proposed in its charter, or extend its line, or build extensions or branches connected therewith or any line of railroad whatsoever, until it shall have obtained the certificate of the Railroad Commission that public convenience and necessity require it; and that the application to the Commission for such certificate shall be accompanied by maps and profiles of the proposed route, that notice thereof shall be given to interested parties, that the certificate and maps shall be filed as directed, that such steps shall be conditions precedent to the right of the railroad company to institute and maintain condemnation proceedings, and that an appeal for review may be taken from the action of the Commission to the Dane county circuit court; yet we find no provision or provisions taking the place of the conditions imposed by secs. 1831 and 1820, Stats. (1898), by which the railroad company, by its properly constituted authority, the board of directors, must declare its purpose to undertake the construction of branches and extensions of its railroad and to secure the privileges conferred by law. This step is very essential in order that it may assume the obligation and inform the state of its intention to accept the rights and perform the duties of a common carrier and that it proposes to conduct this public business over such designated branches and extensions. The steps to be taken by it, under ch. 454, Laws of 1907, to secure a certificate of convenience and necessity, are not an equivalent of the act of the board of directors under sec. 1831, Stats. (1898), to obtain these rights. The conditions imposed by this chapter are designed to protect the public against the building of unnecessary roads and to secure advantageous location of those which are deemed necessary for the public purposes, and are precedent to securing

the privilege of doing a railroad business. Since the company has not complied with the conditions of secs. 1831 and 1820, Stats. (1898), appellants, as property owners whose land is sought to be condemned for the use of the railroad, can insist that this proceeding to condemn and take their property for such use be dismissed. It follows that the order of the circuit court appointing commissioners to appraise the lands in question is erroneous and must be reversed, with directions to dismiss the application.

Counsel have fully presented the question of the sufficiency of the certificate of convenience and necessity as granted by the Railroad Commission. The certificate declares that such convenience and necessity require the construction of a railroad commencing at the bridge described therein, and thence to a point at or near Pouilliot avenue, and then certifies "that the portion thereof covered by this certificate is between said Pouilliot avenue and E street in Roy's addition to the city of Superior, as shown by map attached." The two parts of the certificate are contradictory. The first part certifies to the necessity of an extension of the railroad over the whole distance between the points first located, while the last part covers only a small part of the line authorized to be built between the two points specified. It is averred by the petitioner that the certificate authorizes construction of the whole extension, and the latter clause in the certificate authorizes the building of a part of it at this time. We find no authority for such a certificate. The only authority granted the Commission to issue a certificate for part of a proposed railroad is that conferred by sec. 1797—51, Stats. (Laws of 1907, ch. 454). This section, however, confers no authority to authorize the building of only a part of a railroad which the Commission has certified to be required for public convenience and necessity. We think the certificate is fatally defective in this respect and this renders it void.

Many other questions respecting the scope and conclusive-

ness of the certificate, as to the questions involved in the proceeding before the Commission for its issuance, and as to the provisions of ch. 454, Laws of 1907, as abrogating conditions precedent to the right of instituting condemnation proceedings theretofore imposed by statute, and also the right of the petitioner to construct its road so as to seriously impair or to deprive owners of land fronting on St. Louis Bay of their riparian rights, have been presented. Determination of any of these questions is not required to dispose of the questions involved in this appeal and we do not therefore decide them.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with directions to enter an order dismissing the application to institute and maintain condemnation proceedings.

MARSHALL, J., took no part.

A motion for a rehearing was denied September 29, 1908.

McCORD, Appellant, vs. EASTERN RAILWAY COMPANY OF MINNESOTA and others, Respondents.

May 8—September 29, 1908.

Railroads: Taking of land without first making compensation: Consent of owner: Constitutional law: Injunction: Statutes construed.

1. The permanent appropriation of land for railway purposes is a taking within the meaning of sec. 13, art. I, Const.; and the legislature has no power to authorize such a taking of private property against the will of the owner without compensation first made or tendered.
2. The entry by a railway company upon lands without the consent, tacit or express, of the owner and without compensation, with intention to appropriate them permanently, is unlawful and will be restrained.

3. Equity will, in such a case, protect the owner in his right to the free and exclusive use of his property, the remedy at law being less adequate, comprehensive, and efficient to the ends of justice and its prompt administration.
4. Although a railway company entered upon land in this state and graded it for a roadbed, without protest from any one, yet it appearing that the owner resided and was at the time in the state of Oregon; that when his attorney in this state first learned of the entry the grading was nearly finished; that he at once telegraphed to the owner and received instructions to enjoin the company, but the grading was then completed, and the attorney had no knowledge or information until three or four weeks later that further work was to be done; and that he then obtained a temporary injunction,—it is *held* that there had been no consent, express or tacit, by the owner to the entry upon the land.
5. Sec. 1852, Stats. (1898),—providing that in any case where a railroad corporation shall not have acquired title to the lands upon which it shall have constructed its roadbed or track it may proceed to acquire such title by condemnation; that the court in such proceeding may authorize the corporation to continue in possession of the land, and, upon security being given, may stay all actions or proceedings against the corporation on account thereof; that the owner may institute the condemnation proceedings if the corporation delays or omits to prosecute the same; and that no injunction to restrain the completion or operation of the road shall be granted until the compensation for the lands has been fixed,—does not mean that a railroad company may take and hold possession of land without the consent of the owner and without first making or tendering compensation.
6. Neither ch. 454, Laws of 1907, nor a certificate of public convenience and necessity issued thereunder by the Railroad Commission, gives a railroad company the right to take property or to interfere with the rights of property owners without first making compensation.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This action was brought against the defendants to enjoin them from further trespassing upon the plaintiff's premises and from taking permanent and exclusive possession of said

premises by building a railroad thereon. The complaint, after alleging ownership in plaintiff, alleges:

"That early in the month of September, 1907, the said defendants by their agents, employees, and servants, without the consent and against the wishes of this plaintiff, entered upon and took possession of a portion of the lands aforesaid and appropriated the same to their own use, and commenced extensive operation by way of excavating and grading the land so entered upon for the purpose of making a roadbed for the laying of a number of railroad tracks and the operation of a railroad across and upon said premises, and are now engaged in carrying on said work, all without the consent of this plaintiff and against his wishes; that said defendants are about to further unlawfully excavate, grade, and disturb the land so owned by this plaintiff and to take permanent possession thereof to the exclusion of this plaintiff, and are about to lay railroad tracks, construct and operate a railroad thereon, all against the wishes of this plaintiff and without his consent, and will do so unless restrained by the order of this court."

The complaint further alleges, in substance, that damages have not been ascertained, determined, paid, or tendered to the plaintiff, and that plaintiff will suffer great and irreparable injury if defendants are not restrained from further prosecuting the work, and is duly verified. A temporary restraining order was issued upon the complaint September 19, 1907, restraining the defendants from further entering upon, taking possession of, excavating, grading, or in any manner disturbing the lands until further order of the court.

The answer of defendant *Eastern Railway Company* admits the plaintiff's title to the land, and alleges that it had various negotiations with plaintiff and other landowners and endeavored to make a reasonable treaty with said owners, but was unable to purchase from them; that at the time of the service of the injunction defendant had wholly completed the grading and filling on the land of plaintiff; that the entry and work upon the land was done to the knowledge and ob-

servation of every one, including plaintiff, and that defendant peaceably proceeded with the building of its roadbed without interruption until September 20th. It further sets up a certificate of convenience and necessity from the Railroad Commission of Wisconsin and an approval of plans and specifications.

The answer of defendant *Great Northern Railway Company* in effect disclaims all connection with the entry upon plaintiff's land, and denies that it in any manner disturbed the same or intends to do so or build any railroad thereon.

A motion to dissolve the temporary injunction was made by defendants based upon the complaint, answer, and affidavits of R. I. Farrington and Lyman T. Powell. The affidavit of Farrington on behalf of defendants practically goes no farther than the defendants' answers, and does not show that plaintiff had any knowledge or information of the work being done, simply following the allegations of the answer to the effect that the work was done in a peaceable manner and without protest. The affidavit of Powell on behalf of plaintiff sets up specifically that plaintiff resided in Portland, Oregon, and had not been in Superior since 1906, and that affiant was in charge of the property in question for plaintiff; that he first learned of defendants' entry upon the land August 21, 1907, when the excavation was nearly finished; that he immediately wired plaintiff and received directions two days later to enjoin defendants; that he believed the work upon the land by way of excavation was then completed, and that he had no knowledge or information that they intended to do anything further until the 17th day of September, which was Saturday, when he was informed that they intended to continue the work; that he then immediately proceeded to prepare the papers to enjoin defendants.

An order was made dissolving the injunction on condition that defendants file a bond in the sum of $20,000 to indem-

nify plaintiff, and further providing that defendants might continue the occupancy and possession of the premises and complete the construction of the railroad, with $10 costs to defendants. Plaintiff appealed from this order.

For the appellant there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

J. A. Murphy, for the respondents.

The following opinion was filed June 5, 1908:

KERWIN, J. The permanent appropriation of land for railway purposes is a taking within the meaning of the constitution of this state, which provides that private property shall not be taken without compensation. The compensation must be first made or tendered. *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Powers v. Bears,* 12 Wis. 214; *Bohlman v. G. B. & L. P. R. Co.* 30 Wis. 105. The only exception to this rule under our constitution and statutes is where the railroad company takes possession with the consent, tacit or express, of the landowner. We think this rule is so well established in this state as to render citation of authority unnecessary.

The first and vital question presented, therefore, is, Did the railway company take possession of the land with the consent of the plaintiff? This question must be determined upon the papers used on the motion to dissolve. The motion was heard on the pleadings and affidavits, which, as appears from the statement of facts, show that no consent, tacit or express, was given by plaintiff, but, on the contrary, that plaintiff objected to the entry before condemnation and ordered injunction proceedings commenced. The defendant *Eastern Railway Company of Minnesota* attempts to justify its entry upon the land under certificates of the Railroad Commission and peaceable possession taken publicly and without interruption, and that it had at the time the injunction was served finished its grading and was unable to make

a purchase from plaintiff, although it did succeed in purchasing most of the land necessary for its railroad. There is no express allegation in the answer that plaintiff ever consented that defendant could take possession, or any fact showing such consent. The affidavit of Farrington on behalf of defendant states generally that the defendant *Eastern Railway Company* has without protest from any one graded the land in question for a roadbed and is about to lay its railroad thereon; while the affidavit of Powell, used on behalf of plaintiff, sets up facts which are undisputed, to the effect that at the time of the grading plaintiff was out of the state of Wisconsin and in Portland, Oregon, and that affiant telegraphed him, and when he received answer to enjoin the grading had been finished, and that he had no knowledge or information that any further trespass would be committed or that defendants intended any further trespass until the 17th day of September, 1907, and that he then immediately took steps to restrain defendants before the laying of any railroad tracks on the land in question. So it will be seen from an examination of the papers used on the motion that there was no consent, tacit or express, but, on the contrary, plaintiff, as soon as he had notice, objected and ordered injunction action commenced to restrain defendants from entering upon the land. So we think the record clearly shows that there was no consent on the part of plaintiff to entry upon the premises in question. In the absence of consent, tacit or express, we think it is well settled in this state that, without compensation first made, entry by a railroad company upon lands with intention to permanently appropriate them is unlawful and will be restrained. *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Bohlman v. G. B. & L. P. R. Co.* 30 Wis. 105; *Bigelow v. West Wis. R. Co.* 27 Wis. 478. Under the constitution of this state the legislature has no power to authorize a railway company to take possession of and permanently occupy the lands of a private citizen without

his consent for the purpose of constructing a railroad thereon without first making or tendering compensation. *Taylor v. C., M. & St. P. R. Co.* 63 Wis. 327, 24 N. W. 84; *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, 64 N. W. 1038; *Stewart v. Milwaukee E. R. & L. Co.* 110 Wis. 540, 86 N. W. 163; *Powers v. Bears,* 12 Wis. 214; *Ford v. C. & N. W. R. Co.* 14 Wis. 609.

The broad language of sec. 1852, so much relied upon by counsel for defendants, we think cannot be construed to mean that a railroad company may take and hold possession without the consent of the landowner and without first making or tendering compensation. And it is manifest from the provisions of sec. 1850 that such was not the intention of the legislature. The latter section provides that after the making of the award the company may pay to the owners of the land taken or to the clerk of the court the amount of the award, and thereupon may enter upon, take, and use the land. This language seems to negative the idea that the land can be taken before compensation is made. Counsel for defendants cites several Wisconsin cases in support of his position, but we are unable to see that they are out of harmony with the rule that consent, express or implied, on the part of the landowner is necessary to justify a railway company in taking and occupying land before compensation is made or tendered.

In *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515, 21 N. W. 623, the company had built its road on the land several years before the action was brought, and the court said (61 Wis. 521, 21 N. W. 625):

"The plaintiff ought not to be permitted to sustain this action, for the reason that the facts stated show with sufficient certainty that the defendant has acquiesced for so long a time in such taking as to amount to a tacit assent thereto, and that in such case he must resort to his proceedings under the statute to have his damages assessed for such taking, and not by an action of trespass for damages."

In *Babcock v. C. & N. W. R. Co.* 107 Wis. 280, 83 N. W. 316, the court, after referring to *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, 14 N. W. 273; *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, 64 N. W. 1038; *Hooe v. C., M. & St. P. R. Co.* 98 Wis. 302, 73 N. W. 787; and *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 54, 77 N. W. 155, said (107 Wis. 282, 83 N. W. 317):

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the statutory duty of repairing the highway. The railroad company would probably submit complacently to an injunction restraining it from the performance of that duty."

In *Milwaukee & N. R. Co. v. Strange,* 63 Wis. 178, 182, 23 N. W. 432, it is said that the remedy by injunction is lost where the owner has by express or tacit consent permitted the company to enter.

The appellant was entitled to equitable relief. A remedy at law will not bar equitable interference where such interference would be more adequate, comprehensive, and efficient to the ends of justice and its prompt administration. *Gullickson v. Madsen,* 87 Wis. 19, 57 N. W. 965; *Miller v. Drane,* 100 Wis. 1, 75 N. W. 413. The plaintiff was entitled to the free and exclusive use of his property without restraint or unlawful interference and equity will protect him in that right. *Marshfield L. & L. Co. v. John Week L. Co.* 108 Wis. 268, 84 N. W. 434; *Powers v. Bears,* 12 Wis. 214; *Diedrichs v. N. W. U. R. Co.* 33 Wis. 219; *Church v. Joint School Dist.* 55 Wis. 399, 13 N. W. 272; *Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436, 78 N. W. 1096.

Nor do we think ch. 454, Laws of 1907, or the certificate of convenience and necessity issued in pursuance thereof, touches the question here. It does not purport to give a railroad company the right to take property without first making compensation therefor, even if the legislature had the power to do so, or to interfere with the rights of property owners without first making compensation under the statutes of this state and the decisions of this court.

The facts in the record respecting consent are practically undisputed, and upon such facts it is clear that there was no consent, express or tacit, to the entry by the defendants upon the land of the plaintiff. The entry by defendants was therefore unlawful, and the plaintiff was entitled as matter of right to a preliminary injunction restraining defendants from further trespassing and building their road

upon his land before making compensation. It follows that the order appealed from must be reversed.

By the Court.—The order appealed from is reversed, and the action remanded for further proceedings according to law and in accordance with this opinion.

MARSHALL, J., took no part.

A motion for a rehearing was denied September 29, 1908.

AGNEW, Appellant, vs. BALDWIN, Respondent.
SAME, Respondent, vs. SAME, Appellant.

May 12—September 29, 1908.

(1, 2, 5) *Appeal: Waiver of right: Stipulated judgment: Exceptions to charge: Sufficiency.* (3, 4) *Contracts: Partial reduction to writing: Parol evidence: Statute of frauds: Abrogation.*

1. Where the court below granted a new trial unless defendant would stipulate to remit a part of the damages awarded by the jury on his counterclaim and allow a judgment for plaintiff for a certain sum, and defendant filed such a stipulation, he thereby waived his right to appeal from the judgment entered in accordance therewith.
2. The plaintiff in such case, however, who did not move for judgment on defendant's stipulation and did nothing to waive his claim to recover the entire amount for which he sued, did not lose his right to appeal.
3. The question being whether the parties made an oral agreement by which plaintiff was to convey to defendant certain lots and to fill them with earth so as to raise the surface one foot, and defendant was to pay therefor in lumber of a certain value and by assumption of a mortgage on the lots, the fact that a conveyance of the land and a written contract for delivery of the lumber were afterwards executed, neither of which purported to contain the entire contract, did not preclude the admission of parol evidence to show the other part of the agreement, relating to the filling of the lots.

4. The promise to fill the lots in such a case was a contract for services and not a sale of property, and when the parties put in writing those parts of the agreement which the statute of frauds required to be written the statute was satisfied and the entire contract became binding, unless the agreement to fill had been abrogated by consent of the parties before the writings were made.
5. An exception "to those portions of the charge to the jury which are as follows," followed by portions of the charge covering separate propositions, many of which are unassailable, is an omnibus exception presenting no specific question for consideration.

APPEALS from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed on plaintiff's appeal; defendant's appeal dismissed.*

This is an action to recover damages for failure to deliver a part of the lumber agreed to be delivered by the terms of a written agreement executed by defendant to the plaintiff November 28, 1905. The agreement recites the receipt of the sum of $2,200, and provides for the delivery of lumber of good quality therefor at such times and places in the village of West Allis as plaintiff may direct, and at the lowest cash prices for which the same could be bought of retail dealers. It is admitted that the defendant delivered lumber under the contract amounting to $1,831.44 and refused to make further deliveries, leaving $368.56 worth undelivered.

The defendant by way of answer and counterclaim alleged in substance that on or about November 23, 1905, the parties made an agreement, which the evidence shows was oral, by which plaintiff agreed to sell and convey to defendant two village lots in West Allis and to fill said lots with earth within a reasonable time so as to raise the surface one foot, and the defendant agreed to pay for the lots and the filling the sum of $4,200, of which sum $2,200 was to be paid in lumber and $2,000 by the assumption of a mortgage already existing and covering the premises; that in pursuance of this agreement the defendant, on the 28th of No-

vember, executed the lumber contract in question, and on the same day the plaintiff conveyed the premises to the defendant by deed; that the defendant paid and satisfied the mortgage in January, 1906; that thereafter he delivered lumber on the contract amounting in value to $1,831.54; that the plaintiff, though often requested, failed and refused to fill the lots as agreed; and that the reasonable value of such filling is the sum of $180, which sum he claims to recover in this action, and tendered judgment to the plaintiff for $188.46 and costs up to the time of service of the answer. The tender was not accepted by the plaintiff, and a reply was filed denying that he made any agreement to fill the lots, and alleging that the lumber contract and the conveyance contain the entire contract between the parties.

At the opening of the trial the defendant was allowed to amend his answer so as to allege damages upon his counterclaim in the sum of $500 instead of $180 and demand judgment in his favor for $131.54. The plaintiff proved that only $1,831.44 worth of lumber had been delivered upon the contract and that defendant had refused to make any further deliveries, and rested. The defendant was then allowed to testify, against objection, to the making of an oral contract between himself and plaintiff early in November, 1905, by which the plaintiff agreed to convey the property to the defendant and fill the lot one foot, and the defendant agreed to pay therefor $2,200 in lumber and assume the $2,000 mortgage. The negotiations leading up to this alleged oral contract were conducted by one Kinkel, who was the plaintiff's agent. Kinkel was present at the time the final oral agreement was made, and also testified that plaintiff agreed to fill the lot. The defendant introduced as confirmatory of his testimony a letter sent by plaintiff to him November 24, 1905, as follows:

"Mr. Kinkel will arrange with you and assume all the responsibility of filling the lot as per our conversation this

his consent for the purpose of constructing a railroad thereon without first making or tendering compensation. *Taylor v. C., M. & St. P. R. Co.* 63 Wis. 327, 24 N. W. 84; *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, 64 N. W. 1038; *Stewart v. Milwaukee E. R. & L. Co.* 110 Wis. 540, 86 N. W. 163; *Powers v. Bears,* 12 Wis. 214; *Ford v. C. & N. W. R. Co.* 14 Wis. 609.

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Buchner v. C., M. & N. W. R. Co. 56 Wis. 403, 14 N. W. 273, is relied upon as being in point here, for the reason that the occupation in that case had been only a month, during which time there had been no dissent from the landowner. It will be seen, however, that the *Buchner Case* is clearly distinguishable from the instant case and not out of harmony with other cases in this court holding that consent, tacit or express, is necessary. In the *Buchner Case* the railroad was in the street and not upon plaintiff's land, and was completed when the injunction was asked for. The court said (56 Wis. 420, 14 N. W. 277):

"Contrary to an allegation in the complaint, the railway track is not laid upon the plaintiff's land. Under these circumstances a preventive injunction would seem to be inoperative. It could not properly go to restrain the defendant from running its trains, because they are not run upon the plaintiff's land. It ought not to issue to restrain the defendant from completing the restoration of the highway by graveling the same, because the public interest requires that to be done. And it would be idle to restrain the defendant from further interference with plaintiff's land, because it has no occasion to interfere further with it, unless it be to perform

ports to contain the entire contract. The deed is simply a muniment of title and its recital of consideration is always subject to investigation. The lumber contract does not purport to state the nature of the consideration upon which it is founded. If the oral contract was as the defendant claims and as the jury found, then it is clear that the whole contract was not reduced to writing, but only such parts of it as were necessary to convey the title of the land and define the obligation of the defendant to deliver lumber. Where parts only of an entire verbal contract are reduced to writing, parol evidence is admissible to show the remaining parts. *Mueller v. Cook,* 126 Wis. 504, 105 N. W. 1054, and cases there cited.

But it is further claimed that the entire verbal contract was void because not in writing. However, those parts which the statute requires to be in writing, namely, the conveyance of the land and the agreement to deliver the lumber, were subsequently reduced to writing. The promise to fill the lots was a contract for services and not a sale of property, and hence was not within the statute of frauds. *Meincke v. Falk,* 55 Wis. 427, 13 N. W. 545; *Central L. & E. Co. v. Moore,* 75 Wis. 170, 43 N. W. 1124. When the parties put those parts of the contract in writing which the statute requires to be written, manifestly the statute was satisfied and the entire contract became binding, unless indeed the agreement to fill the lots had been abrogated by the parties before the writings were made. The letter in evidence written on November 24th is claimed to amount to an abrogation of that part of the contract. There was sufficient evidence, however, from which the jury could find that the defendant at once objected to the proposal in the letter and insisted on the original contract, and, if they so found, then there was no abrogation by consent of the parties. The plaintiff is insisting upon the performance of the lumber contract, and, if the agreement to fill the lots was a part of the considera-

tion for it, he can hardly claim that he has abrogated that part of it by his own act, which was not assented to by the defendant.

It is claimed that there were errors in the charge of the court. By his written exceptions the plaintiff first excepted "to those portions of the charge to the jury which are as follows." Here follow more than two pages of printed matter contained in the charge, covering many separate propositions, most of which are absolutely unassailable. This is therefore an omnibus exception which presents no specific question for consideration. The plaintiff further excepted to those parts of the charge which assume that the parol agreement was valid and charge that its terms could not be modified except by assent of both parties. As previously indicated in this opinion, there was no error in the charge in these respects in a case like the present where the plaintiff is endeavoring to enforce one of the parts of the original agreement.

A third exception is based on the failure of the court to charge that the parol agreement was void because not in writing, and his further failure to instruct that the letter of November 24th, followed by the written agreement to deliver lumber, constituted a waiver on the part of the defendant of any claim of liability for refusal to fill the lots. These propositions also are disposed of in the previous discussion in this opinion.

There are no other questions which require attention.

By the Court.—The appeal of the defendant is dismissed, and upon the plaintiff's appeal the judgment is affirmed.

A motion by the plaintiff for a rehearing was denied September 29, 1908.

MAXON, Respondent, vs. GATES, Appellant.

May 12—September 29, 1908.

(1) *Contracts: Abrogation: Pleading.* (2, 3) *Appeal: Review of evidence: Motion to set aside verdict.* (4, 5, 9) *Special verdict: Sufficiency: Waiver: Changing answers.* (6) *Findings of fact: Recitals in judgment.* (10, 11) *Tax titles: Sufficiency of deed: Recitals.* (7, 8, 12–17) *Vendor and purchaser of land: Evidence: Readiness of purchaser to perform: Sales by vendor to others: Measure of damages for breach of contract: Market value: Deduction for tax titles.*

1. In an action upon a contract, abrogation thereof by mutual consent is new matter and, if relied upon as a defense, must be specially pleaded.
2. A motion for judgment notwithstanding the verdict does not challenge the sufficiency of the evidence to support the findings and cannot be treated as a motion to set aside the verdict on that ground.
3. Where there was no motion to set aside the verdict the supreme court will not review the evidence to determine its sufficiency.
4. In an action for breach of a contract it was stipulated that a special verdict be taken as to all issues except certain ones reserved for trial by the court. No objection was made to the form or sufficiency of the questions submitted, and in answer to one of them the jury found that the contract had not been, as alleged in the answer, abrogated on a certain day by mutual consent. There was no motion to set aside this answer, and no suggestion was then made that the issue as to abrogation had not been determined. Afterwards for more than two years proceedings were had at intervals for the purpose of ascertaining the amount of the damages. *Held*, that defendant's counsel had treated the question of abrogation of the contract as embraced in and determined by the special verdict or as settled by the undisputed evidence, and could not properly contend, on appeal, that the question was still open as to an abrogation subsequent to the day mentioned.
5. The court cannot change the answer to a question in the special verdict if there is any credible testimony to support it.
6. A recital in the judgment that allegations of the complaint had been established by the undisputed evidence is *held* sufficient as a finding of facts, although the practice is not approved. If defendant desired a more particular finding he should have requested it.

7. A finding that plaintiff had been at all times ready and willing to perform on his part a contract for the conveyance of lands to him, is *held* to be sustained by the evidence.
8. In an action for breach of a contract to convey lands, evidence that after the contract was made defendant had conveyed certain of said lands to other parties was admissible as bearing upon the intention of defendant to repudiate the contract and also as showing the value of the lands from the consideration stated in the deeds.
9. An order was made on defendant's motion, after the testimony had closed, reopening the case as to certain issues upon the express condition that the parties agree and stipulate that the findings of the jury then impaneled be taken by way of special verdict on all the other issues. No objection was made to the special verdict, which embraced the questions counsel then thought material for determination; there was no motion to set aside; nor was the attention of the trial court at any time called to any supposed omission therefrom, although the trial was protracted for a long time thereafter. *Held*, that questions as to the form and sufficiency of the verdict were foreclosed.
10. A tax deed reciting that "J. L. Gates, and assignee of Ashland county, has deposited" certain tax certificates, etc., sufficiently shows that J. L. Gates, the applicant for the deed, presented himself as assignee of the county. The word "and" before "assignee" should be rejected as surplusage or as written by the clerk through mistake for "an."
11. A further recital in the deed that it appears from the certificates that the lands described were for nonpayment of taxes sold "at public auction, at Ashland, in the county of Ashland and J. L. Gates," on a day named, "to the said Ashland county for the sum," etc., shows that the lands were sold to the county. The words "and J. L. Gates," inserted after "the county of Ashland," describing the place of sale, cannot be transposed and inserted after "Ashland county" where it is named as the purchaser, and thus make it appear from the deed that there was a joint sale to the county and Gates, which would be unlawful. *Sprague v. Cœnen*, 30 Wis. 209, distinguished.
12. The "market value" of land is the price that would in all probability result from fair negotiation where the seller is willing to sell and the buyer desires to buy; and the expressions "actual value" and "market price" mean the same thing.
13. In an action for breach of a contract to convey a large quantity of lands—some by quitclaim deeds and others by warranty deed subject to incumbrance—the measure of plaintiff's dam-

ages is the difference between the price agreed to be paid and the actual value of the lands at the time of the breach, if sold in a body, subject to outstanding incumbrances, to one ready and willing to buy; such damages to be ascertained with reasonable certainty as the natural result of the breach and as within the probable contemplation of the parties at the time the contract was entered into.

14. Evidence of sales made at or about the time of the breach of a contract to convey lands is admissible as bearing upon the actual value, when it appears that there has been no sudden change in conditions. In this case too much weight is *held* to have been given to evidence of sales made a year or more after the breach and after there had been a decided advance in values.

15. The value of the lands in small parcels should not in such a case be taken as the basis of damages, since that would be greater than their value in a body and neither party could have contemplated a resale in small parcels within a short time.

16. Upon the evidence in this case it is *held* that the fair market value of the large quantity of lands which defendant held by tax titles and was to convey to plaintiff by quitclaim deed was $1.75 per acre.

17. Although a tax deed fair upon its face is *prima facie* a marketable title, yet, it being matter of common knowledge that a tax title is not as acceptable to the ordinary purchaser as an original title, it was proper for the court, in determining the amount of damages for breach of a contract to convey by quitclaim deed lands held by tax titles, to make a deduction for diminution in value on that account; and a deduction of fifteen cents per acre is *held* reasonable in this case.

APPEAL from a judgment of the circuit court for Milwaukee county: E. B. BELDEN, Judge. *Modified and affirmed.*

This action is brought to recover damages for breach of a contract entered into between the plaintiff and defendant January 8, 1900, whereby the defendant agreed that he would within a reasonable time cause to be conveyed to the plaintiff by quitclaim deed, executed by himself and wife and the International Land Company, certain lands in Ashland and Iron counties. The descriptions of these lands were contained in Exhibits A and B, attached to the contract. Defendant also agreed that he would, at the same

time, transfer to plaintiff certain tax certificates covering said lands held by him and said company, and also to assign all claims for trespass committed upon such lands, if any, in favor of the grantor. In the same contract defendant also agreed that he would within a reasonable time cause to be conveyed to the plaintiff, by quitclaim deed executed by the Ashland County Land Company, substantially all the stock of which was held by him, certain other land, situated in Ashland county, the descriptions of which were contained in Exhibit C, attached to the contract. The lands embraced in these descriptions will be referred to hereinafter as the "tax-title lands" or the "quitclaim-deed lands." In the same contract the defendant covenanted to cause to be conveyed to plaintiff, by warranty deed from the Ashland County Land Company, certain other land situated in Ashland county, described in Exhibit D, attached to the contract, subject to an agreement for the sale of the timber thereon to Charles E. Tobey, said lands to be free and clear of all incumbrances except said timber contract. The lands embraced in this description will be hereinafter referred to as the "warranty-deed lands." The plaintiff agreed in said contract to pay as the purchase price the sum of $3,000 on performance by the defendant, $2,000 upon the day of the execution of the deeds and the delivery of the tax certificates mentioned, and the balance to be secured by a mortgage upon the lands.

The action was first tried in Ashland county, where it was originally brought, and a special verdict rendered, which was set aside on plaintiff's motion. The order granting a new trial was affirmed upon appeal taken by the defendant to this court. *Maxon v. Gates,* 112 Wis. 196, 88 N. W. 54. Thereafter the venue was changed from Ashland county to Milwaukee county.

The complaint, as amended, sets out the making of the contract, that the plaintiff has been at all times since its execution ready and willing to perform on his part, that he has

frequently demanded performance of the defendant, that the latter has refused and still refuses to perform, and that the plaintiff has thereby sustained damages to the amount of $15,500, for which judgment is demanded. The contract is attached to the complaint as an exhibit.

The answer, as amended, puts in issue the material allegations of the complaint. It alleges that on January 8, 1900, the plaintiff represented to the defendant that he was desirous of purchasing the tax deeds and certificates which the county of Ashland held, described in the exhibits attached to said contract and situated in said county; that the rule of said county was to sell only to the owners of the land, and that he desired the defendant's signature to said contract to enable him to make the purchase as such owner; that if he did not succeed in acquiring the certificates and tax deeds of the county board, referred to, within six days, he would return the contract to the defendant; that the defendant, relying upon said statements, did sign the contract and intrust the same to the plaintiff upon the conditions stated; that the contract was never delivered and never had any binding force for any other purpose. It is then alleged that the plaintiff did not succeed in purchasing said tax titles within six days from January 8th, or at any time, and that he never paid the defendant the sum of $3,000, or any part thereof, for said lands; that said plaintiff, on the 16th day of January, 1900, came to the office of the defendant in Milwaukee and then informed him that he could not get Ashland county to sell its subsequent tax certificates and tax deeds to him, as he supposed; that said plaintiff then and there stated that he could not and did not want to purchase said land and certificates from said defendant and declined to carry out the terms and conditions of said contract, and it was then and there mutually agreed between said parties that said contract was abrogated and annulled, "and that the deal was off without damages to either party." The an-

swer then contains a general denial of the averments of the complaint not expressly admitted.

Upon the issues raised by these pleadings the action came on for trial in the circuit court for Milwaukee county before a jury, the Hon. E. B. BELDEN, judge presiding. The trial continued until the 1st day of February, 1904, at which time the testimony was closed. Thereupon questions for a proposed special verdict were submitted by both plaintiff and defendant. Before the verdict was submitted to the jury the defendant moved the court for leave to reopen the case in order to enable him to show the state of the title, so far as taxes, tax certificates, and tax titles or deeds were concerned, of the lands described in Exhibits A, B, and C, attached to the contract, between May 1, 1893, and June 1, 1900. After argument a recess was taken, presumably to enable counsel to submit the form of the order to be entered upon defendant's motion. When the trial was resumed a form of order was submitted and the order was finally agreed upon and entered, the substantive part of which is as follows:

"Ordered, that the case be and is hereby reopened, and defendant is hereby permitted to offer evidence as to the state of said titles as above set forth, and the plaintiff is permitted to offer evidence in rebuttal of defendant's evidence hereby permitted to be introduced, and the parties hereto are also permitted to further show the value of said lands described in said Exhibits A, B, and C, and the title thereto, as they may be advised. This order having been made upon the express condition and terms that the parties to said action mutually agree and stipulate that the findings of the jury now impaneled in said cause may be taken by way of a special verdict at once as to all the issues in said cause other than the issues as to the titles to the lands above referred to, and said jury then discharged, and that the court may, at some future date to be fixed by the court, take evidence as to said titles and values and determine the issues in reference thereto, and in making its findings upon said issues the court may consider all the evidence in the case and take the finding of the jury

as to the value of said lands in said Exhibits A, B, and C as advisory merely, and that when said findings are made the court may enter its judgment as though all the issues in the case had been submitted to and determined by the jury."

Thereupon a special verdict was rendered by the jury, in which it found: (1) That on January 8, 1900, the plaintiff did not state to the defendant that he could not carry out the trade with *Gates* unless Ashland county consented to transfer to plaintiff its tax certificates and tax deeds on the lands described in Exhibits A, B, and C, attached to the complaint; (2) that the agreement of January 8, 1900, was not signed by the defendant and given to plaintiff conditionally, to go into effect only upon the plaintiff acquiring the tax certificates and tax deeds of Ashland county upon the lands described in Exhibits A, B, and C, attached to the complaint; (3) that on the 16th day of January, 1900, the deeds of the International Land Company and *James L. Gates* and wife and the Ashland County Land Company were not executed and ready for delivery; (4) that the defendant did not on the 16th day of January, 1900, offer such deeds and tax certificates and titles held by him and the International Land Company and the Ashland County Land Company to the plaintiff properly executed; (5) that the plaintiff and defendant on the 16th day of January, 1900, at the office of *James L. Gates,* in the city of Milwaukee, Wisconsin, did not mutually agree that the writing dated January 8, 1900, should not be enforced; (6) that in January and February, 1900, the market value of the lands described in Exhibit D, attached to the contract of January 8, 1900, including the water power thereon and exclusive of the timber thereon, was $4,000; (7) that in January and February, 1900, the market value per acre of the lands described in Exhibits A, B, and C, attached to the contract of January 8, 1900, was forty cents per acre.

Upon the return of the special verdict the defendant

moved for judgment in his favor notwithstanding the verdict. The defendant made no motion for a new trial. On October 30, 1905, after a number of continuances, the trial of the case was resumed upon the issues reserved to be tried by the court under the order of February 1, 1904, and was continued until the 7th day of February, 1906, at which time the testimony was closed.

A stipulation was entered into between the parties December 8, 1906, wherein it is admitted that the title to said land described in Exhibit 1, thereto annexed, was on January 8, 1900, good in *James L. Gates* or the International Land Company, and that the title to said land described in Exhibit 2, thereto annexed, was at said date good in said *James L. Gates* or the Ashland County Land Company, and the amount required to redeem each of said descriptions of land on March 1, 1900, from outstanding tax sales or certificates and taxes other than those held by *Gates* was that set out in said exhibits opposite each such description. It was further agreed that *Gates* held certain tax certificates against certain lands included in the contract, and one of which was stated in Exhibit 3, attached to the stipulation. In regard to certain other lands, the descriptions of which are set out in Exhibit 4, attached to the stipulation, it was agreed that if a certain tax deed, which had been offered in evidence and marked "Exhibit W1," is valid, then the defendant had title to such lands, and they were to be conveyed to plaintiff under the contract. The amount of tax certificates held by defendant against certain of these lands was stated, and the amount required on March 1, 1900, to redeem each description of land in this exhibit was agreed upon. Exhibits 5 and 6, attached to the stipulation, contained descriptions of land originally held by defendant, or by one or the other of the two companies mentioned, which had been conveyed away prior to January 8, 1900, and to which the plaintiff abandoned any claim. It was further

agreed that neither the defendant nor either of said companies had on January 8, 1900, any title to any of the lands in controversy in this action (except the lands described in Exhibit D, attached to the contract), except the titles mentioned in the stipulation, and all of said titles were tax titles. This stipulation removed from consideration a number of descriptions amounting to 17,200 acres, included in the contract, and among the lands which were to be conveyed by quitclaim deed. The plaintiff made no claim on account of any of these lands and no damages were allowed by the court in respect of them.

The court found the value of the lands, the title to which was admitted by the stipulation, to have been $23,459.43 at the time the contract was broken; deducted from this amount the total taxes outstanding against them, amounting to $9,974.49, leaving a net value of $13,484.94; made a further deduction of fifteen cents an acre in view of the fact that all the titles were tax titles; and added $116.60 as the value of the tax certificates held by the defendant which were to have been transferred to plaintiff—making a total of $12,362.99 as damages on account of these descriptions at the time of the breach of the contract. The court found that the tax deed, Exhibit W1, was valid, and fixed the value of the lands embraced in it at $3,160; deducted from this $925.28, as the amount of outstanding taxes, leaving a net value of $2,234.72; and made a further deduction of fifteen cents an acre as before—leaving a net balance of $2,063.72 as plaintiff's damages on account of these descriptions. The jury had found the value of the lands described in Exhibit D, attached to the contract, which were to be conveyed by warranty deed, to be $4,000. This was added to the damages found by the court. From the total of all these sums was subtracted the sum of $3,000, which was to have been paid by plaintiff under the contract. This left a balance of $15,426.71 as the amount of plaintiff's recovery for

the breach of his contract. Interest was added from April 2, 1900, the date of the commencement of the suit, to July 11, 1907, the date of entry of the judgment, making an amount of $22,157.85, and to this was added $631.76 as the costs of the action, making a total of $22,789.61, the amount of the judgment, from which this appeal was taken.

Defendant filed specific exceptions to the findings of the court relating to the breach of the contract by the defendant, to each valuation placed by the court upon the several descriptions of land, to the total net valuations of all the lands, to the amount of the deductions to be made for tax titles, and separate exceptions to the conclusions of law.

For the appellant there were briefs by *Winkler, Flanders, Bottum & Fawsett,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *Mr. Flanders.*

Glenway Maxon, in pro. per., and *Frank M. Hoyt,* of counsel, for the respondent.

The following opinion was filed June 17, 1908:

BASHFORD, J. Counsel for appellant concede that the issue raised by the answer, that the contract of January 8, 1900, was executed conditionally, is settled by the special verdict in view of the conflicting testimony. We have, then, as a starting point, an absolute contract binding upon both parties. It is urged, however, on behalf of appellant that this contract was abrogated by mutual consent of the parties. Abrogation, like a release or discharge, is new matter constituting a defense, and, if relied upon, must be specially pleaded. Sec. 2655, Stats. (1898); 18 Ency. Pl. & Pr. 89; *Salchert v. Reinig,* 135 Wis. 194, 115 N. W. 132. The answer alleges that on January 16, 1900, the parties mutually agreed that the contract was abrogated and annulled. The jury, in answer to the fifth question of the special verdict, found that the parties did not on January 16, 1900, mutually agree that the contract of January 8, 1900, should

not be enforced. Appellant's counsel now contend that the question whether the contract was subsequently abrogated by mutual consent is not foreclosed by this finding, and that defendant's motion for judgment notwithstanding the special verdict leaves this question still open. The questions for a special verdict, as prepared by the court, were apparently approved by counsel for appellant. Certainly no modification thereof was suggested and no objection thereto taken, and the question of abrogation, as raised by the pleadings, must therefore be treated as having been fairly submitted. After the verdict was received this question and answer were not challenged by defendant's counsel, who made a motion for judgment notwithstanding the verdict. The motion for judgment notwithstanding the verdict admits for the purpose of the motion the existence of the facts found by the jury, and asserts that, taking the verdict at its face, the judgment should go the other way. *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800; *Hay v. Baraboo,* 127 Wis. 1, 105 N. W. 654. It does not challenge the sufficiency of the evidence to support the findings, and cannot, therefore, be treated as a motion to set aside the verdict upon that ground. There was no motion to set aside the verdict, and consequently this court cannot review the evidence upon the subject. We conclude, therefore, that this issue of abrogation was settled by the special verdict.

This conclusion is re-enforced by the provisions of the order to reopen the case for the trial by the court of the questions relating to the title and value of the quitclaim-deed lands. It was therein stipulated that the findings of the jury should be taken by way of a special verdict as to all the issues except those mentioned. The form of the verdict was then under consideration, as appears from recitals to the order. It was not challenged either as to the form or the sufficiency of the questions to be submitted, and it is clear that counsel then understood that it covered all the contro-

verted facts except such as were reserved for trial by the court. There was no motion to set aside the answer to this question after the verdict was rendered, and no suggestion then made by counsel that this issue had not been determined. Thereafter, for a period of more than two years, at different intervals, the court was engaged in hearing proof upon the questions reserved, the arguments of counsel, and preparing the findings and judgment. There was no occasion for this continued, protracted, and expensive trial if the contract was not in force, as all the subsequent proceedings were had for the purpose of ascertaining the amount of damages for its breach. We must hold that appellant's counsel, by their conduct as above indicated, have treated this question of the abrogation of the contract as embraced in and determined by the special verdict or as established by the undisputed evidence. *Geisinger v. Beyl,* 80 Wis. 443, 50 N. W. 501.

Counsel for appellant insist that the finding of the court that he breached the contract is contrary to the great preponderance of the testimony. This issue, so far as it is raised by the pleadings, is decided by the special verdict. The answer denies the execution of the contract by the defendant except conditionally, and avers that it was abrogated by mutual consent on January 16, 1900. Defendant testified that upon that day he offered to perform the contract on his part and that he then tendered the deeds therein called for to the plaintiff. The jury, by the answers to the third and fourth questions, negatives these statements of the defendant. There was no objection to the form of these questions and no request to submit a question embodying an offer of performance at a later date. In answer to the fourth question the jury found that the defendant did offer to the plaintiff the tax certificates and titles held by him, "but not properly executed." Appellant's counsel moved to strike out the words quoted as unsupported by the evidence. The court cannot

change the answer to a special verdict if there is any credible testimony to support it. The answer as given is sustained by a clear preponderance of the evidence, and the court in its findings of fact adopted March 1, 1900, as the date of the breach. Counsel for appellant, in argument, do not claim that the deeds tendered to the plaintiff by the defendant were executed in accordance with the contract, but rather seek to excuse the failure to offer full performance. The proof sustained the finding of the court, to which exception was taken, as to the fact of the breach by the defendant and as to the date thereof. The plaintiff, in a letter addressed to the defendant, dated February 23, 1900, stated that he then was and for some time had been ready to perform the contract on his part, and requested performance by the latter. The defendant's reply, bearing the same date, expressed surprise "that you should claim or demand anything from me or for the deeds," and contained a refusal of performance on his part. Plaintiff again wrote, insisting upon performance, and defendant's reply, dated February 27th, in substance repeated his refusal to perform and a denial of liability for damages. These letters and his conduct prior thereto, evidenced by correspondence and conveyances, showed beyond question that the defendant had decided that he would not comply with the terms of this contract. Appellant was not prejudiced by the finding of the court that the breach occurred on or about March 1st, and fixing upon that as the date for ascertaining the damages.

The complaint alleges that the plaintiff was and at all times had been ready and willing on his part to perform the contract. Counsel for appellant contend that this averment was put in issue by the general denial contained in the answer, and that the question has not been determined either by the special verdict or by the finding of the court. There was no request to submit this issue to the jury, but it was treated as settled by the testimony; and it would seem to be

too late to raise the question in view of the subsequent proceedings heretofore referred to. In the findings of the court there is the following recital:

"And the truth of all the allegations of the plaintiff's complaint, other than those determined by said stipulation, said special verdict, and by the findings of the court hereinafter set out, having been established on the trial by the undisputed evidence," etc.

There was no exception to this recital by the appellant. Where the recitals of the judgment amount to findings of fact they have been held sufficient, although the practice is not approved. If the defendant desired a more particular finding on this issue he should have called the attention of the court thereto and should then have taken an exception to the refusal to find, or to the finding as made, if not satisfactory. *Wrigglesworth v. Wrigglesworth,* 45 Wis. 255. However, if this objection had been properly and seasonably taken, we could not have reached a different conclusion from the evidence than that stated by the trial court. *Mr. Maxon* testified that he was ready to perform on February 23d, when the pretended tender of the deeds and certificates was made by the defendant. And the plaintiff in the letter already quoted advised the defendant he was and had been ready to perform on his part. These statements are not disputed, and the recital of the court was fully warranted by the testimony. It was held upon the former appeal that it was not necessary for the plaintiff to tender payment of the purchase price to enable him to maintain an action for a breach of this contract by the defendant. *Maxon v. Gates,* 112 Wis. 196, 88 N. W. 54.

Counsel for appellant contend that the trial court erred in treating the defendant's ability to perform the contract on his part as one of the issues in the cause. Reference is made to the complaint, in which it is stated that the defendant was able to perform, and it is claimed that there is noth-

ing in the answer which can be construed as putting this allegation in issue. The answer does not expressly admit this averment of the complaint and contains no direct reference thereto, and it concludes with a general denial of every allegation therein not expressly admitted. We are unable to understand why, if the general denial is to be treated as putting in issue the plaintiff's ability to perform, it does not raise the question of defendant's ability. In view of the finding that the plaintiff was ready and willing to perform on his part and that the defendant refused, this objection can have no materiality except as it relates to the admission of proof as to certain conveyances made by the defendant of the lands in question to other parties after the contract was entered into. This testimony was admissible as bearing upon the intention of the defendant to repudiate the contract and also as showing the value of the land from the consideration stated in the deeds. If the testimony was material we are unable to see how the defendant has been prejudiced by its admission.

But we must hold that the questions raised on behalf of the appellant with reference to the proceedings upon the trial by the jury, by the consent order entered, are foreclosed by the special verdict and the order entered in connection therewith, reopening the case for the trial of the issues not embodied therein by the court. This order was made upon the express condition that the findings of the jury then impaneled should be taken by way of a special verdict as to all the issues in said cause other than the issues relating to the title and value of the quitclaim-deed lands, that the findings of the jury upon these last issues should be taken as advisory merely, and that when findings were made judgment should be entered as though all the issues had been submitted to and determined by the jury. The special verdict, which embraced the questions counsel then thought material for determination, found that the contract had not been executed con-

ditionally by the parties, that it had not been abrogated, that it had been breached by the defendant, and the value of the lands to be conveyed by warranty deed, and also, as advisory, the value of the quitclaim-deed lands. If there was a material issue that was not embraced in the verdict as prepared, the attention of the court should then have been called thereto, or, if it was subsequently discovered that such an issue had been unintentionally overlooked, that fact should have been brought to the attention of the court, so that the order might have been modified, and the issue so omitted included therein for the determination of the court. It would seem like a travesty upon justice to proceed with this protracted and expensive trial and then to set aside the judgment upon any ground not going to its merits.

Counsel for the respective parties, by stipulation entered into December 8, 1906, agreed upon the validity or invalidity as to the titles of the lands which were to be quitclaimed by the defendant to the plaintiff under the terms of the contract, except the tax deed marked "Exhibit W1," which was offered in evidence by the plaintiff and objected to by the defendant upon the ground that it was void upon its face. The trial court sustained the validity of this deed, and this ruling is assigned as error on behalf of the appellant. The tax deed recites:

"Whereas, *James L. Gates, and assignee of Ashland county,* has deposited in the office of the county clerk of the county of Ashland, in the state of Wisconsin, seventy-five (75) certificates of the county treasurer of said county whereby it appears" that the lands described were for the nonpayment of taxes separately sold by the county treasurer of Ashland county "at public auction, at Ashland, in the county of Ashland, *and J. L. Gates* on the nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-one, to the said Ashland county, for the sum of three hundred fifty-two dollars and sixty-four cents," etc.

On behalf of the appellant it is claimed that this deed is void for the reason that there is nothing in it to show that *James L. Gates,* the grantee therein named, was either the purchaser or the assignee of the purchaser at the tax sale, and also for the reason that the deed shows that the sale was a joint sale made by the treasurer of Ashland county to the county and *James L. Gates.* Counsel for respondent claim that it appears from this deed that the lands were sold at a tax sale to Ashland county, and that it appears upon its face that *James L. Gates* is the assignee of Ashland county. Both counsel rely upon *Washburn L. Co. v. C., St. P., M. & O. R. Co.* 124 Wis. 305, 102 N. W. 546. That case holds that substantial compliance with the form prescribed by statute is all that is required; that omissions and blunders that do not prejudice or deceive any one or affect the substance of the conveyance do not militate against the rule of substantial accuracy required by the statute. Reference is made to the three significant features material to the deed, the first of which is that the recitals therein should show that the applicant presents himself as the original owner of the certificate or as his assignee. It is apparent from the first line of this deed that *James L. Gates* presented himself as assignee of Ashland county. The singular verb is used, showing that the application was made by one person only. Consequently the language used cannot be construed to mean that there was an assignee of Ashland county in addition to *James L. Gates,* who presented the certificates. The word "and" before "assignee" should be rejected as surplusage, or as written by the clerk through mistake for "an." The second requirement, as stated in the opinion cited, is that the recital should show the name of the purchaser at the tax sale, in order that it might appear that he was a person competent to purchase. It appears from the recitals in this deed that the lands were sold to Ashland county. The words "*James L. Gates*" are inserted after "the county of

Ashland," describing the place of sale, and it is not permissible to transpose those words and insert them after "Ashland county" where it is named as the purchaser. These blunders in the reciting part of the deed, evidently made by the county clerk, cannot mislead anybody and do not invalidate the instrument. Counsel for appellant also refers to *Sprague v. Cœnen,* 30 Wis. 209. In that case it appeared from the deed itself that the land was sold "to the county of Brown and Edson Sherwood." The court held that this could have been no other than a joint sale, which was entirely unauthorized by law, and the deed was therefore void. That decision can have no application to the deed before us upon the construction we have placed upon its recitals. In the granting part it conveys the land described to *James L. Gates,* and we hold that he thereby acquired the title, and that these lands were embraced in the contract of sale to the plaintiff.

The remaining assignments of error relate to the measure of damages and present questions of serious difficulty in the application of legal principles to the circumstances of this case. The jury found the value of the 2,100 acres which were to be conveyed by warranty deed to be $4,000. There was a water power situated upon these lands and some indications of mineral, and the testimony was sufficient to sustain this finding. With respect to the 30,000 acres of land which were to be conveyed by quitclaim deeds, and the titles to all of which were doubtful, the jury found the value to be forty cents an acre, but made no deduction for the expense of clearing up these titles. There was no proof before the jury to show the condition of these titles, and this valuation covered the whole tract in its existing state of uncertainty. It was stipulated that the verdict as to these lands should be treated as advisory merely, and that the court should, upon proof to be submitted, determine the questions of title and value for the purpose of fixing definitely the amount of dam-

ages, if any, that were to be recovered. The parties themselves, after investigation, subsequently stipulated that there were 8,257.02 acres the title to which was undisputed. The court placed a value on this land of $23,459.43, or an average price of $2.84 an acre. The validity of the tax deed "W1" was disputed by defendant, but it has been upheld by the court, and it embraces 1,140 acres. The trial court found the value of these lands to be $3,160, or an average of $2.77 an acre. The value of the tax-title lands, as ascertained by the court, aggregates $26,619.43. The court made deductions from this valuation of $10,886.39, the principal item being for unpaid taxes, making the net value thereof $15,733.04. In addition thereto is the valuation of the warranty-deed lands, fixed by the jury in the sum of $4,000, making the total net value of the lands $19,733.04 in January and February, 1900 (the date will hereafter be referred to as March 1st), which the defendant had agreed to sell the plaintiff for $3,000 on January 8, 1900. Such a result is startling, and, if the parties were differently circumstanced, might challenge the contract as unconscionable. But the defendant had been purchasing tax titles upon cut-over lands, had been dealing in real estate in northern Wisconsin for over thirty years, and must be presumed to have had some knowledge of the location and value of these tracts, while the plaintiff's experience in such matters was more limited. The parties dealt at arms' length, each competent of understanding his own interests and of protecting his own rights. In entering into this contract they must be held to have comprehended the nature and possible consequences of its breach. It hardly seems credible that the defendant, with his large experience in such matters, would have voluntarily sold to the plaintiff these lands for less than one-sixth of their actual value. The proof does not show any cause for an extraordinary increase in the value of lands situated as these were between the date of the contract and its breach.

The conclusion of the trial court as to the amount of damages recoverable by the plaintiff has called for a careful consideration of the application of the legal principles upon which the findings are based and of the evidence upon which they are sought to be supported.

The general rule for the measure of damages in an action brought by the vendee against the vendor for breach of such contract is the value of the land the defendant contracted to sell, estimated at the time the contract was broken, less what the plaintiff agreed to pay therefor. *Muenchow v. Roberts,* 77 Wis. 520, 46 N. W. 802.

"In estimating damages the court and jury are to look at the nature and terms of the undertaking or thing to be done; how it was expected and intended or proposed to enjoy that which the parties have bargained for, and how they were and would be benefited by performance or damnified by a breach of the particular engagement under the particular circumstances." 8 Am. & Eng. Ency. of Law (2d ed.) 584.

"And so it is often said that, in an action for a breach of contract, the damages to be recovered are such as may reasonably be supposed to have been in the contemplation of both parties when they made it." *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 353, 11 N. W. 356, 360.

"The damages recoverable for breach of contract are such as may fairly and reasonably be considered the natural and proximate result thereof, and in the light of circumstances, special or otherwise, known to both parties at the time of making the contract, may reasonably be supposed to have been in contemplation by them as the probable result of such breach." *Gross v. Heckert,* 120 Wis. 314, 321, 97 N. W. 952, 954.

"So it is held that prospective profits should not be allowed, without evidence to base the same on sufficiently certain to remove the result from the realms of pure conjecture." 120 Wis. 329, 97 N. W. 957.

The market value of land at any time is the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy.

Sharpe v. U. S. 112 Fed. 893, 898; *Ligare v. C., M. & N. R. Co.* 166 Ill. 249, 46 N. E. 803; *Lawrence v. Boston,* 119 Mass. 126. The expressions "actual value," "market value," or "market price," when applied to an article, mean the same thing. *Sanford v. Peck,* 63 Conn. 486, 27 Atl. 1057. These general rules are not questioned. They are supposed to be founded upon principles of natural justice, and should be so applied as to secure reasonable compensation to the injured party.

Where the subject of sale is a staple commodity, the difference between the contract price and the market price at the time of the breach is readily ascertainable and generally furnishes a safe standard for the measure of damages. *T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513. This rule is not altogether appropriate to the present situation, the more adequate criterion of damages here being compensation for the actual loss suffered under the principles above stated. The evidence of sales made at or about the time of the breach is admissible as bearing upon the actual value, when it appears that there has been no sudden change in conditions, and the proof in that regard offered on behalf of the respective parties has received such consideration as the circumstances seem to warrant.

The plaintiff here, therefore, is entitled to recover, as compensation for the defendant's refusal to convey, the difference between the price agreed to be paid and the actual value of the lands on March 1, 1900, if sold in a body, subject to outstanding incumbrances, to one ready and willing to buy, such damages to be ascertained with reasonable certainty as the natural result of the breach and as within the probable contemplation of the parties at the time the contract was entered into. In the application of the law to the evidence in this case, the court erred in adopting as a basis for compensation the value of the lands in small parcels, and in giving too great weight to the proof of sales made a

year or more subsequent to the breach and after there had been a decided advance in values. There is a great discrepancy in values of this class of lands, dependent upon the amount of timber, the nature of the soil, the remoteness of the situation from railways and settlements, and the absence of highways and schoolhouses. The court in the findings places a high value upon separate tracts of forty acres or less, 980 acres being valued at $2 or less, and the remainder at $2.50, $3, $3.50, $4, and $5 per acre, making the average about $2.80 per acre. The plaintiff himself testified: "Prices of a small quantity of land, or land at retail, would be more than prices of land in large quantities." Neither party could have contemplated a sale of these lands in small parcels within sixty days, or that the measure of damages in case of breach would be estimated by the aggregate values of separate descriptions after all outstanding liens had been discharged and the titles established. That the method of valuation was prejudicial to the defendant is demonstrated by the verdicts of the two juries. The first trial of the action took place at Ashland in 1901, and the jury fixed the value of the 30,000 acres of quitclaim-deed lands, incumbered with outstanding tax claims and with the titles uncertain, at ten cents an acre. Upon the second trial in 1901 the jury placed a valuation upon the same lands, in the same situation, at forty cents an acre. The last verdict was treated as advisory merely, and was not entitled to great weight, after the parties had stipulated as to the quantity of land with good title and the amount of the outstanding liens. Had this verdict been permitted to stand, the total valuation would have been subject to a large deduction to redeem from tax sales and cover the labor and expense involved in making the necessary investigation to ascertain the condition of the titles and the amount of the incumbrances. A better test is afforded by the finding of the last jury that the 2,100 acres of warranty-deed lands, with the water power and min-

eral rights, was worth $4,000 on March 1, 1900. With respect to this tract the plaintiff had testified that it was worth, exclusive of the water power and timber, $3 per acre, and that the water power was worth $10,000, making a total of $16,300. The timber had been sold subject to removal before the contract was entered into, and the defendant, in his testimony, placed a valuation upon this land of $400, including the water power, which he did not consider of any value. The jury, from these conflicting statements and the other testimony offered, reached the conclusion that this land was worth about $1.90 per acre, and this finding is not challenged by either party, by motion to set aside the answer or otherwise. It is practically conceded, at least the proof sufficiently establishes the fact, that these lands were more valuable than the remainder embraced in the contract. It is true that after the verdict was rendered further proof was offered as to the value of the quitclaim-deed lands, but after a careful examination thereof we conclude that it does not warrant the high valuation fixed by the court.

For a proper application of the rules of law, as above stated, for ascertaining the compensation to be awarded for the breach of this contract, in addition to the verdict already mentioned, the evidence may be considered with reference to the condition of the market in the spring of 1900 for the sale of land similarly circumstanced, in a body, the opinions of witnesses, based upon actual conditions, and the sales which were made at or about that time. These were known as "cut-over lands," from which the pine and spruce had been removed, and which had been abandoned by the original owners and sold for the nonpayment of taxes. They were mainly situated remote from any railroad or settlement and were mostly without highways or schoolhouses. The hardwood, where there was any, was not readily salable by reason of the situation, and the lands possessed no immediate value for agricultural purposes, even where the soil was suitable.

Witnesses called by the defendant, who were familiar with the situation, testified that there was no market for such lands in large bodies in the spring of 1900, that there were hundreds of thousands of acres for sale in Ashland, Bayfield, Iron, Price, and adjoining counties, with few purchasers, and that there was no demand for such lands except for trading or speculative purposes. The highest price placed upon such lands in a body at that time by these witnesses was fifty cents an acre. The defendant, who had been dealing in such lands in northern Wisconsin for thirty-five years, testified with respect to the quitclaim-deed lands that prior to the signing of this contract he had made efforts to sell them to all the speculators and prospective buyers in the country, and that they had been looked over by fifty prospective purchasers; that he had offered them at wholesale in 1899 and 1900 at twenty-five cents an acre. The statements of *Mr. Gates* as to his efforts to sell these lands were not disputed. The experts called on behalf of the plaintiff placed a much higher value on these lands, basing their estimates on the situation and condition of particular descriptions and not upon the sale of the entire tract in a body. The valuation fixed by them was upon the average much higher than that found by the court. We can but feel that these witnesses were very largely influenced in giving their opinions by the sales that were made of land in small parcels and after there had been a decided advance in price, and consequently their estimates cannot have weighty consideration. It appears from a preponderance of the evidence that there was a rise in the price of such lands beginning in the latter part of 1900, and that the price increased in a marked degree during the ensuing four or five years. The actual sales made immediately before January and February, 1900, and shortly thereafter may be considered with other proof, though it cannot be given controlling weight, in determining the values to be placed upon these lands. The price agreed to be paid

ought also to have some bearing on this question. This sale for $3,000 embraced 2,100 acres of land to be conveyed by warranty deed, with a water power and mineral indications, which the jury has valued at $4,000, and about 10,000 acres to be conveyed by quitclaim deed.

It is apparent that the parties themselves considered the tax-title lands as of little value. During the negotiations for the purchase of these lands the plaintiff selected and purchased lands in the same vicinity of the defendant, on November 18, 1899, 520 acres for $250, subject to outstanding tax certificates, which, when bought, made the total cost $1.43 per acre. About the same time the plaintiff purchased another tract of 1,000 acres, similarly situated, incumbered with tax certificates, for seven and one-half cents an acre, which, when the title was cleared up, cost $1.40 an acre. The defendant testified that in January, 1900, he sold 11,000 acres of cut-over lands in Price county, upon which the taxes were paid, for sixty-two and one-half cents an acre; that they were similar in character to the lands here in question, but more favorably located. This testimony was corroborated by the purchaser of the tract. Defendant testified to another sale of 10,000 acres in the same county, similarly circumstanced, at forty cents an acre; that he purchased 40,000 acres from the Weyerhauser estate in Sawyer county in 1900, with a clear title, for ninety cents an acre; that these lands were better than the Ashland county lands and were sold in 1901 for $1.50 an acre; that in September, 1899, he bought 82,000 acres of cut-over lands from Price county at twenty-five cents an acre; that in 1900 he purchased 100,000 acres of such lands from Chippewa county, of better quality and location, for fifty cents an acre; that he bought 50,000 acres of cut-over lands in Bayfield county, in January, 1900, for thirty cents an acre; that at about the same time he purchased 21,000 acres from Washburn county, with the taxes all paid, at ten cents an acre. Mr.

Kennan, an intelligent witness for defendant, who had had large experience in dealing in such lands in northern Wisconsin, testified to sales made by him, or with his knowledge, from March, 1899, to January, 1901, the prices varying with the situation and character of the lands, the quantity of timber, and the condition of the title. He mentions a sale of 520 acres, heavily timbered, on August 20, 1901, by a warranty deed for $1,250; a sale January 11, 1901, of 3,100 acres in Ashland county, subject to tax titles, for $150; a sale of 17,000 acres of cut-over lands in Iron county, December 13, 1900, for fifty cents an acre; a sale of 4,000 acres August 10, 1901, fairly well timbered, for $1.61 an acre; a sale on October 12, 1901, of 8,000 acres, for $1.50 per acre, some of it well timbered, by warranty deed, taxes all paid, and better located than the lands in suit; a sale of 5,000 acres in Ashland county, October 20, 1901, at $1.87 an acre, the greater part of the land heavily timbered and taxes all paid; that the purchaser failed to complete the purchase, and the same lands were sold a year later for $2.50 an acre. The only sale of a large tract of land testified to by any witness for plaintiff was 11,978 acres in Ashland county, sold September 1, 1901, for $4.50 per acre. These were better lands than those here in question and carried valuable timber, and were bought by the owners of a mill for lumbering and manufacturing purposes. The purchasers required an abstract of title and warranty deeds and bought the land primarily for the timber, as they were not engaged in the real-estate business. Mr. Nash, one of the purchasers, testified that these lands were bought primarily to supply the mill which they expected to erect there, and that had it not been for the timber they would not have cared for the lands. The sale of 12,000 acres by the Northern Wisconsin Land Company to the Underwood Veneer Company in 1899 for $3 per acre was of a similar character, the chief value being the timber for veneering purposes. The price paid for

land under such circumstances can have but little weight in determining the value of "cut-over lands" bought for an immediate resale and for speculative purposes. The proof with respect to the sales actually made, in connection with the expert testimony, still leaves considerable latitude for the exercise of judgment in determining the value of the tax-title lands.

In connection with the expert testimony and the proof of actual sales, the evidence of the parties themselves must have great weight in determining the measure of damages which they probably had in contemplation in case of a breach of this contract. Reference has been made to sales and purchases by the defendant in Ashland and neighboring counties in 1899 and 1900. On cross-examination the defendant stated that in his opinion the value of the tax-title lands on March 1, 1900, was $3,500, provided the purchaser was willing to put in more money to clear up the titles. Taking that as the net value and adding the amount of outstanding incumbrances, $10,899.77, the value of these lands upon this estimate is approximately $1.50 per acre. Reference has also been made to the testimony of the plaintiff of purchases made by him in November, 1899, of two tracts of "cut-over lands," similarly situated but in better condition, which cost him, when the titles were cleared up, on the average of about $1.42 an acre. In a letter written by the plaintiff to the defendant November 8, 1899, when negotiating for the purchase of the lands embraced in this contract, he gives his view of their value. He had then been furnished a list and had caused an examination to be made of the land situated in Ashland county, and had also sought to ascertain at what price that county would sell the tax titles and certificates which it held. He learned that the county "might be willing to sell its deeds and certificates for face. This would make your lands cost me about all they are worth." He then quotes from a letter received from a party

who had contemplated joining in the purchase with him, as follows:

"I was at Ashland and thoroughly investigated the list of lands you gave me, and as yet am not satisfied to go into the deal, as I find that most of the lands have been cut over, and even the hardwood and spruce taken therefrom. I went over to Morse and went out with a woodsman myself and looked over a part of the lands, and I must say that I do not think very much of them."

The plaintiff adds:

"I recently purchased 1,000 acres of original title, which is in far better condition than yours, for seven and one-half cents an acre. Out of the list of lands which you gave me not over 10,000 to 12,000 acres can be cleared up, as the statute of limitations has run on adverse tax titles as against you and your company, and the cream of your land is gone. In some instances you have quitclaimed, and in other instances the timber is taken off. I can see no money in it for me, unless I can get what title you and your companies have at a very nominal sum."

He then offered $2,000 for what title the defendant and his companies had in the lands, the tax certificates to be turned over with the quitclaim deeds. The better land which plaintiff had bought for seven and one-half cents an acre, cost him, when the title was cleared up, $1.40 per acre, and it is apparent that he did not consider the land which he was proposing to buy of the defendant was of any greater value.

This view of the plaintiff's estimate of the quitclaim-deed lands at the time the contract was entered into is reinforced by his testimony as to the value of the 2,100 acres which were to be conveyed by warranty deed. He estimated the value of these lands on February 23, 1900, exclusive of the water power, at $3 per acre, and the value of the water power at $10,000. It is apparent, therefore, that he did not consider the tax-title lands of great value at the time the

contract was entered into or when it was broken. Considering the testimony of the plaintiff that the value of the tax-title lands at the time the purchase was made was less than the tract he purchased at a cost of $1.40 an acre, and of the defendant that at the time the contract was breached they were worth $1.50 per acre, and the verdict of the jury that the better lands, with the water power, to be conveyed by warranty deeds, were worth about $1.90 an acre, and the opinions of the experts and the proof of actual sales, we have concluded that the fair market value of the tax-title lands to be sold in a body in January or February, 1900, was $1.75 per acre.

The court also found that the plaintiff was entitled to a credit in the sum of $116 for tax certificates held by the defendant and which were to be transferred to the former by the latter under the terms of this contract. The court further found that the titles of the defendant and his companies to the quitclaim-deed lands, by reason of their being tax titles, were worth fifteen cents an acre less than the value as fixed in the findings, and made the proper deduction therefor. This finding was excepted to by the defendant and is assigned as error on this appeal. A tax deed fair upon its face is, under our statute, a marketable title, and after the three-year statute of limitations has run in its favor there is no reason to question its validity. *Gates v. Parmly,* 93 Wis. 294, 312, 66 N. W. 253, 67 N. W. 739. Nevertheless, it is a matter of common knowledge that a tax title is not as acceptable to the ordinary purchaser as an original title, and consequently it was proper for the court, in determining the amount of plaintiff's damages, to consider the diminution of the value of the lands on that account. Without undertaking to establish any fixed rule or to prescribe any particular standard, we have concluded, in view of the approval of these titles by the attorneys of the respective parties, after thorough examination, with the exception already referred

to, and which has been overruled, to accept the conclusion of the trial court upon the subject that a deduction of fifteen cents an acre is reasonable under the circumstances of this case. Making this deduction, the net value of the tax-title lands is $1.60 per acre. The plaintiff is also chargeable with $3,000, the purchase price of the land, no part of which has been paid, and also with the amount required to pay and redeem from the taxes outstanding against these lands, as found by the trial court, in the sum of $10,899.77. There were 9,397.02 acres of tax-title lands, the value of which, at the net value of $1.60 per acre, amounts to $15,035.23, leaving the value thereof, after deducting the amount required to pay outstanding taxes, $4,135.46. Upon the foregoing basis the amount the plaintiff is entitled to recover from the defendant by reason of the breach of the contract is as follows:

Verdict as to value of warranty-deed lands	$4,000 00
Net value of tax-title lands after deduction	4,135 46
Tax certificates held by defendant and to be assigned	116 60
Total	$8,252 06
Less purchase price	3,000 00
Amount of plaintiff's recovery	$5,252 06

As so modified, the judgment stands as entered July 11, 1907, as follows: Damages, $5,252.06; interest from April 2, 1900, to July 11, 1907, $2,292.53; costs as taxed, $631.76—total, $8,176.35.

By the Court.—Judgment modified, and affirmed as modified; respondent to pay the costs on this appeal.

On September 29, 1908, a motion by appellant for a rehearing was denied and a motion by respondent for a rehearing was dismissed.

HAGENAH, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

May 12—September 29, 1908.

Affirmance on equal division of court.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN K. PARISH, Judge. *Affirmed.*

This action was brought to recover for personal injuries. At the time of injury the plaintiff, a street laborer, was working for the Wisconsin Telephone Company placing gravel between cedar blocks in the street, and while thus employed was run into by one of defendant's cars. The issues involved were negligence of defendant and contributory negligence of plaintiff. The court below nonsuited plaintiff, and judgment was entered in favor of defendant dismissing the complaint, from which judgment this appeal was taken.

For the appellant there was a brief by *Glicksman & Gold,* and oral argument by *W. L. Gold.*

Clarke M. Rosecrantz, for the respondent.

The following opinion was filed June 17, 1908:

PER CURIAM. Justice TIMLIN having been of counsel in this case and not sitting, the court, after a careful consideration of the questions involved, is equally divided; three justices favoring affirmance and three reversal. This situation, under the established rule, necessitates affirmance of the judgment below. *Jacobs v. Queen Ins. Co.* 123 Wis. 608, 101 N. W. 1090; *Swenson v. Flint,* 123 Wis. 613, 101 N. W. 1135; *Francisco v. Hatch,* 124 Wis. 220, 101 N. W. 1135; *Cook v. M., St. P. & S. S. M. R. Co.* 125 Wis. 528, 103 N. W. 1097.

By the Court.—The judgment of the court below is affirmed.

A motion for a rehearing was denied September 29, 1908.

LAUGHY, Respondent, vs. BIRD & WELLS LUMBER COMPANY, Appellant.

September 8—September 29, 1908.

Master and servant: Assumption of risk: Knowledge of defects: Railroad brakeman: Defective track: Negligence in making flying switch: Questions for jury.

1. An employee who has as good an opportunity as his employer to know of defects or dangerous conditions attending his work assumes the risk thereof if he voluntarily and without protest continues in the employment.
2. But defects which are discoverable by the exercise of such care as is required of the employer are not necessarily discoverable by such attention to his surroundings as an employee is bound to give.
3. The employee is only required to see and comprehend those defects or imperfections which would ordinarily attract the attention of a person under the same or similar circumstances, in the exercise of ordinary care.
4. Whether an employee in any particular instance is chargeable with knowledge of conditions imperiling his personal safety is generally, though not always, a question for the jury.
5. A railroad brakeman engaged in switching cars was not bound to search or look specially for defects in the track and roadbed likely to cause injury, in the absence of circumstances reasonably suggesting the existence of such defects.
6. In an action for injuries to a brakeman while making a flying switch, resulting from the derailment of an engine tender by reason of the defective condition of the track and roadbed at a curve, one of the defects being the insufficient elevation of the outer rail, it is *held* upon the evidence that the question as to assumption of the risk was one for the jury.
7. Whether, in such a case, if the brakeman was not chargeable with knowledge of the dangerous condition of the track and roadbed, he was negligent in causing the flying switch to be made as it was, was also, upon the evidence, a question for the jury.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover for personal injuries.

October 28, 1905, defendant was operating a logging rail-

road and plaintiff, an experienced railroad man, was in its employ as brakeman. While he was engaged in the regular course of his duties aiding and directing in making a "drop" or "flying" switch at a point where there was a down grade toward the switch and a six-degree curve in the track, he was injured by breaking his ankle, permanently crippling him to some extent. In order to make the switch the engineer under plaintiff's direction pushed the string of cars, consisting of a box car next to the engine and a number of logging cars, back up grade beyond the switch till signaled by plaintiff to stop, and then upon signal he gave them motion down the grade at the rate of some four miles per hour and till signaled to give slack so plaintiff could cut off the logging cars. After the cut-off occurred the engine tender and box car were caused to go down the grade with sufficient speed to pass the point of the switch before the cars reached it, allowing them to pass in on the side-track. As the engine rounded onto the curve the tender left the track. Plaintiff, observing that the car upon which he was riding would inevitably be wrecked, jumped off with the result complained of.

The negligence alleged was that the roadbed where the tender left the track was rough, unsettled, and improperly graded and leveled; that there was an insufficient number of ties to fasten and hold the rails; that the rails were light and negligently fastened to the ties and to each other; and that the track was not ballasted, so that the ties rested lightly upon the roadbed, in the whole making an insecure and dangerous roadbed and track which caused the derailment and consequences. There was evidence tending to establish the affirmative of the question submitted to the jury covering the subject of defendant's negligence, which was as follows:

"Considering the state of the roadbed, the weight and size of the rails, the size and number of the ties supporting each rail, the fastenings of the rails to each other, and to the ties,

the amount of ballast between the ties, the degree of the curve in the track, and the elevation of the outside rail of the track on the curve, at the time and place of the derailment shown by the evidence, was the condition of defendant's railroad then and there so defective that it was not reasonably safe for the use then being made thereof for the work in which plaintiff was then engaged?"

The jury answered in the affirmative and found in plaintiff's favor on other questions, in the whole establishing his right to recover. The damages were fixed at $3,500. Judgment was rendered accordingly, exceptions being saved to present the questions referred to in the opinion.

For the appellant there was a brief by *J. C. Morgan* and *Eastman & Martineau,* and oral argument by *E. C. Eastman.* As to plaintiff's assumption of the risk they cited *Schmitt v. Hamilton Mfg. Co.* 135 Wis. 117, 115 N. W. 353, and cases cited; *Naylor v. C. & N. W. R. Co.* 53 Wis. 661, 664; *Faber v. C. Reiss C. Co.* 124 Wis. 554, 560; *Writt v. Girard L. Co.* 91 Wis. 496, 499; *Clark v. St. P. & S. C. R. Co.* 28 Minn. 138, 2 Am. & Eng. R. Cas. 240, and cases cited on p. 242; *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 581; *Kelly v. Abbot,* 63 Wis. 307, 309; *Evansville & R. R. Co. v. Barnes,* 137 Ind. 306, 36 N. E. 1092; *McMillan v. Spider Lake S. M. & L. Co.* 115 Wis. 332, 335; *Wood v. Locke,* 147 Mass. 604, 18 N. E. 578; *Clark v. Mo. Pac. R. Co.* 48 Mo. 654, 29 Pac. 1138; *Chicago & N. W. R. Co. v. Donahue,* 75 Ill. 106; *Mich. Cent. R. Co. v. Austin,* 40 Mich. 247, 250; *Ragon v. T., A. A. & N. M. R. Co.* 97 Mich. 265; *Hewitt v. F. & P. M. R. Co.* 67 Mich. 61, 66; *Rysdorp v. George Pankratz L. Co.* 95 Wis. 622, 626; *Watts v. Hart,* 7 Wash. 178, 34 Pac. 423, 425; *Atlas E. Works v. Randall,* 100 Ind. 293; *Peterson v. Sherry L. Co.* 90 Wis. 83, 62 N. W. 948; *Wormell v. Me. Cent. R. Co.* 79 Me. 397, 31 Am. & Eng. R. Cas. 272, 278; *Wilson v. W. & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908; *Coombs v. Fitchburg R. Co.* 156 Mass. 200; *Monte v. Wausau P. M. Co.* 132 Wis.

205, 211, 111 N. W. 1114, 1116; *Corrigan v. West Div. S. Co.* 133 Wis. 77, 113 N. W. 441; *Demko v. Carbon Hill C. Co.* 136 Fed. 162, 69 C. C. A. 74; *Pennsylvania Co. v. Ebaugh,* 152 Ind. 531, 14 Am. & Eng. R. Cas. N. S. 701, 705; *Evansville & R. R. Co. v. Henderson,* 134 Ind. 636, 33 N. E. 1021, 1022; *O'Neal v. C. & I. C. Co.* 132 Ind. 110, 31 N. E. 669.

L. M. Evert, attorney, and *P. H. Martin,* of counsel, for the respondent.

MARSHALL, J. No contention is made but that the jury were warranted in finding that appellant's track and roadbed were defective, causing the derailment of the engine tender and consequent necessity, under the circumstances, for respondent to jump from the moving car, and no substantial controversy as to the law governing the case.

That respondent had a right to assume the situation was reasonably safe for the performance of the operation in which he was engaged when injured, unless he knew to the contrary or would have known thereof had he exercised ordinary care to observe the imperfections, and that such care required him to notice and comprehend those things affecting his personal safety which were so open and obvious as to naturally attract the attention of a person so circumstanced in case of his paying ordinary heed to his surroundings, and if under that rule he knew or ought to have known of the defects he must be regarded, since he voluntarily and without protest pursued his employment, to have assumed the risk of the imperfections, is insisted upon on the one side and conceded, as the fact is, upon the other. The law to that effect is very familiar. We are called upon to apply it to a great variety of situations, no two being precisely alike or sufficiently so as to make one such application develop a principle necessarily governing the other, at substantially every meeting here for the decision of cases.

Many expressions in decided cases exist which are often, and are now, referred to as applicable to facts materially different from those in mind at the time they originated; a much broader meaning being ascribed thereto than was intended or can fairly be done. We often see the one used, seemingly now supposed to have controlling significance, that if the employee has as good or better opportunity to know of the defects as the master he assumes the risk. That is good law, but it does not suggest that defects which are discoverable by the exercise of such care as is required to be exercised by the master are necessarily discoverable by such attention to his surroundings as an employee is bound to exercise. Defects may be such as to be perfectly plain to the former and not attract the attention of the latter, since no duty of inspection rests with the servant; to turn aside from the acts of operating in order to specially look or search for defects, in the absence of some circumstance reasonably efficient to suggest existence thereof. The employee is only required to see and comprehend those imperfections which are so significant as to ordinarily attract the attention of a person under the same or similar circumstances, in the exercise of ordinary care, and whether the servant in any particular instance is chargeable with knowledge of conditions imperiling his personal safety is, generally, though of course not always, a jury question.

The foregoing need not be emphasized by the citation of authorities. Moreover it renders unnecessary any detailed consideration of the cases pressed upon our attention. It is sufficient to say in regard thereto that the facts now presented are so different from those in any one of such cases as to preclude the same from being regarded as controlling.

It is the opinion of the court that the evidence does not conclusively show that all of the imperfections which in the whole constituted the dangerous condition found by the jury were of that open, obvious nature which respondent, while

engaged in his work, would necessarily have seen had he exercised ordinary care, and the evidence on his part is to the effect that he in fact did not observe them. It must be said, and is, substantially at least, conceded that there was evidence tending to show the existence of each of the found elements of the dangerous condition. One thereof is the insufficient elevation of the outer rail at the curve. It may well be, we are safe in saying, that such element would not, or might not, attract the attention of a trainman of experience in the exercise of ordinary care while engaged as respondent was before the accident, whatever might be his grade of service. That of itself was sufficient to warrant submitting the question of assumption of risk to the jury, even if some other of the detail imperfections was, or should have been, known to respondent. This conclusion necessarily disposes of the claim that such assumption appears from the evidence as a matter of law, which claim is the principal one relied upon for a reversal, and we will, therefore, not further pursue the subject.

The only other contention made is that the evidence establishes contributory negligence as matter of law. That is largely, if not efficiently, met by the conclusion that the question of assumption of risk was properly submitted to the jury, and the refusal to disturb the finding was not error. There is ample evidence tending to show that, if respondent be not chargeable with knowledge of the dangerous condition of the track and roadbed, he was not guilty of want of ordinary care in causing the engine and cars to move as they did. The first conclusion leaves no escape which we can see from the second.

It is true the evidence shows that respondent might, by the use of the brakes, have held the string of cars to be switched after they were pushed up the grade to the proper point, till the engine had backed clear of the point of the switch, and then let them run down the grade by their own

momentum, rendering it unnecessary for the engine to move toward and onto the curve at the great speed which probably rendered operative the dangerous condition of the track and roadbed and cause the derailment. But there is other evidence tending to show that if the cars had been so held they would not thereafter have attained a sufficient speed by the mere force of gravity to pass fully in on the switch track and, therefore, in order to render the operation of making the drop switch successful, it was reasonably necessary, after the cars were pushed up the grade, to give them return motion at the rate of some four miles per hour, more or less, as was done, which motion combined with the grade gave them such speed as to render it necessary for the engine to pass over the curve at a high rate of speed, in order to clear the point of the switch before they reached the same. So there was evidence tending to show that the whole operation which was directed by respondent was not inconsistent with ordinary care in the absence of knowledge on his part, actual or constructive, that the track and roadbed were unsuitable therefor.

The result of the foregoing is that the judgment appealed from must be affirmed.

By the Court.—So ordered.

LIPSKY, Respondent, vs. C. REISS COAL COMPANY, Appellant.

September 8—September 29, 1908.

Master and servant: Injury to servant: Negligence: Res ipsa loquitur: *Questions for jury: Evidence: Burden of proof: Instructions to jury.*

1. From the mere fall of a timber constituting a part of a building or structure provided as a place in which employees are to work, arises a reasonable inference that the owner of the struc-

ture, the employer, has failed in his duty either to make it safe in original construction or to exercise reasonable diligence and care to keep it safe.

2. In an action for injury to an employee caused by the fall of a timber constituting part of the superstructure of a coal dock, the question whether defendant had proved a reasonable possibility that the loosening of the timber was caused by the partial collapse, within a few days of the accident, as a result of rain, of a somewhat remote part of the dock, and had thus averted the inference of negligence from the accident itself, is *held* to have been one for the jury.

3. The inference of negligence which in a proper case may be drawn from the accident itself is one of fact, and the authority of the jury to decide whether it should be drawn can be excluded only in presence of undisputed proof, not merely testimony, that such negligence did not occur.

4. Proof of inspection of a structure may be evidence in disproof of negligence inferable from the happening of the accident, but is not necessarily conclusive disproof.

5. Even though in such a case defendant has explained or accounted for the fall of the timber in such a way as to overcome the presumption of negligence arising from the accident itself, the fact that the timber fell and the necessary or natural inferences from that fact may still be considered by the jury, in connection with all other facts and evidence, in determining whether or not the fall was due to defendant's negligence.

6. In an action based on alleged negligence of defendant the burden of proof to satisfy the jury of the existence of such negligence is at all times upon the plaintiff, but when he has proved a situation which, unexplained, authorizes an inference or presumption of such negligence, and a specific defensive fact is testified to on behalf of defendant, the jury are not justified in finding the existence of that specific fact unless satisfied by a preponderance of the evidence.

7. In an action for injury to an employee caused by the fall of timber constituting part of the superstructure of a coal dock, an instruction to the jury which is claimed to have put upon the defendant the burden of disproving negligence, but which the jury must have understood to mean merely that they would not be justified in finding that there had been complete and adequate inspection of the structure by defendant unless satisfied thereof by the greater weight of the evidence, is *held*, while unfortunate in its language, not to have been prejudicially erroneous.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Defendant in and for some years before November, 1905, maintained a coal dock on the south side of the river at Sheboygan, which consisted of a floor at a convenient height above the water for unloading, and a superstructure consisting of upright posts extending from the ground to about thirty feet above the floor and, generally, 12x12 in size. These posts were twelve feet apart in one direction and twenty-four feet apart in another. They were surmounted by horizontal beams of about similar size running from one post to the other, both north and south, upon which were laid a system of tracks for tram cars and for certain heavy derricks used in elevating and distributing coal both from vessels and from the floor of the dock. The upright posts were braced to the horizontal beams by 8x8 inch timbers twelve feet in length, placed at an angle of forty-five degrees, either spiked or bolted at each end to the upright and the horizontal timbers, which at the time and place in question had been in place about five years. The dock had been built by or for the defendant.

On November 28, 1905, plaintiff was a common laborer employed by the defendant to shovel coal on the floor of this dock, and, while so engaged, one of these braces, with no apparent present reason, dropped from its place upon plaintiff, causing him serious injuries. There was evidence that the brace was insecurely fastened both to the upright post and the horizontal beam; that is, that it was merely spiked to each, and that the spikes originally penetrated the beams only from one to two inches. There was also some evidence tending to prove that generally through that part of the dock these braces had become parted from the timbers to the extent of one half or three fourths of an inch, and that they were subjected to frequent blows from the dropping of coal

upon them and to much jar from the running of tram cars and the operation of the derricks.

The negligence of the defendant alleged was "failing to provide plaintiff with a reasonably safe place in which to perform his work; that said place was unsafe and dangerous, because of insecure, careless, and negligent fastening of the brace."

The jury, by special verdict, found (1) that the brace which fell was so insecurely fastened to the timbers as to make the place not reasonably safe; (2) that such condition of insufficient fastening had existed for such a length of time that the defendant, in the exercise of ordinary care and vigilance, ought to have known it; (3) that plaintiff's injury was the natural and probable consequence of defendant's failure to discover and repair the defective fastening; (4) that defendant should have foreseen that such insufficient fastening would be likely to result in personal injury to an employee; (5) that ordinary care on plaintiff's part would not have informed him of the insufficient fastening; (6) that there was no failure of ordinary care on plaintiff's part which contributed to cause the injury; and (7) damages $5,333. After denial of a motion to reverse the answers to the first, second, third, and fourth questions, or, in the alternative, to set aside the verdict and grant a new trial, judgment was entered upon the verdict, from which the defendant appeals.

For the appellant there was a brief signed by *Charles A. Vilas,* attorney, and *Edward P. Vilas,* of counsel, and oral argument by *Charles A. Vilas.*

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

DODGE, J. Primarily the appellant contends that the verdict is wholly without evidence in its support. With this contention we can in no wise agree. In the first place we think that from the mere fall of a timber, the constituent

part of a standing building or structure provided as a place in which employees are to work, there arises an entirely reasonable inference that the owner of that building, the employer, has failed in his duty either to make it safe in original construction or to exercise reasonable diligence and care to keep it safe. We can hardly conceive a clearer case for the application of the rule *res ipsa loquitur*. In addition to this, however, there was evidence of very inadequate original fastening of these heavy braces, so that the jury might well have reached the conclusion of unsafety in the original construction.

Appellant further urges, however, that a conclusion of negligent unsafety could not be reached by the jury upon inference from the mere happening of the accident, for the reason that it was proved that within a few days of the accident there had occurred, as a result of rain, the partial collapse of a certain slanting floor of a large pocket, which at least might have caused the loosening of the brace which fell on plaintiff. It is enough to say with reference to this contention that there was considerable evidence introduced by the plaintiff from which the jury, in their field as judges of the fact, might have found that such collapse could not have had any effect upon the general superstructure of the dock or upon the brace in question, considerably remote from the pocket. Hence, although, as declared in *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36, it may be only necessary to prove the reasonable possibility of some cause other than defendant's negligence in order to avert the inference of negligence from the accident itself, it was entirely competent for the jury in this case to say that no such possibility had been proved.

It is further contended that any inference which might otherwise be drawn from the fall of this timber that it was insecurely fastened, or the defendant guilty of negligence in relation thereto, was excluded by proof of the exercise of due care in inspection of the dock by defendant's foreman

the morning before the accident. Upon examination of such evidence, however, which consists of the testimony of the foreman himself and his assistant, we find them to assert an extremely cursory glance about the dock, such that it was by no means certain to inform him as to the existence of looseness or other defect in these timbers, and it was within the jury's competency to consider and decide whether this did constitute such due care as might, under familiar rules, have overcome the inference of negligence. The inference of negligence which in a proper case may be drawn from the accident itself is one of fact, and the authority of the jury to decide whether it should be drawn can be excluded only in presence of undisputed proof, not merely testimony, that such negligence did not occur. *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 285, 71 N. W. 434; *Groth v. Thomann,* 110 Wis. 488, 495, 86 N. W. 178; *Klitzke v. Webb,* 120 Wis. 254, 97 N. W. 901; *Montanye v. Northern E. Mfg. Co.* 127 Wis. 22, 31, 105 N. W. 1043. Proof of inspection may be evidence in disproof of negligence, but not necessarily conclusive disproof.

In this connection appellant complains of an instruction in the following words:

"If the fall of the brace is explained or accounted for by the evidence in such a way as to overcome the presumption that I have stated to you, then your answer to the second question must be 'No,' unless there is other and further evidence on the part of the plaintiff which, together with the effect of that presumption, satisfies you that the explanation offered by the defendant to show that ordinary care and vigilance were exercised by its representative fails to show satisfactorily by the greater weight of all the evidence on the subject that such vigilance and care were in fact so exercised."

It is extremely doubtful whether any exception to this instruction was not waived by a stipulation that in consideration of the taking up of defendant's motion for a new trial in the absence of exceptions he would confine himself to cer-

tain specific ones not including an exception to this portion. However, as we think it does not embody any prejudicial error, we have decided not to allow any uncertainty to stand in the way of its consideration.

The first objection is to that portion which tells the jury that, if an explanation of the fall of the brace has been made such as to overcome the presumption of negligence arising from that fact, they may then consider all evidence on the subject, including the effect of the presumption. Counsel argues that, if the presumption has been overcome by defendant's proof that it has exercised due care in certain respects, that presumption drops out of the case entirely, and that it was error to allow the jury to give it any further consideration. This view of appellant is based upon the idea that this so-called presumption is an artificial and conventional thing which either exists absolutely or is absolutely nonexistent. It is a little unfortunate that in some opinions the term "presumption" has been used instead of the word "inference." There is in the conclusion drawn under the rule *res ipsa loquitur* nothing unnatural, artificial, or peculiar. Human experience and action continually involve inference of one fact from the known existence of another, and from every event like the fall of a brace such as this some inference must be drawn by every mind: certainly the inference that at the moment of its fall it was not sufficiently secure to prevent the fall under then existing circumstances. The fall of the timber is one of the thoroughly established facts, and the court was entirely right in authorizing the jury to take into consideration that fact and the necessary or natural inferences therefrom in connection with all other facts and evidence in reaching their conclusion whether or not it was due to defendant's negligence.

Further, however, it is contended that in the last few lines the instruction throws upon the defendant the burden of proof to negative its negligence; in other words, to show that due care and vigilance were exerted. If we can reason-

ably believe that it may have been so understood by the jury, doubtless error lurks therein. The burden of proof to satisfy the jury of the existence and proximate responsibility of negligence in the defendant at all times rests upon the plaintiff, and yet when the plaintiff has proved a situation which, unexplained, authorizes an inference or presumption of such negligence, and a specific fact is testified to on behalf of the defendant, of course, in the nature of things, the jury are not justified to believe in the existence of that specific defensive fact, unless satisfied by the preponderance of evidence. This is obvious; for, if no evidence at all had been offered of inspection, the jury would not have been justified in finding that such inspection had taken place. We think it plain from the context of this paragraph with the preceding one that the words "such vigilance and care" refer, and must have been understood by the jury to refer, to what is previously described as ordinary care and vigilance to discover and repair the condition of the fastenings of the brace. The only thing in the evidence to which these phrases could apply was that of the foreman and his assistant, offered by defendant, that on the morning in question an inspection was made and no defects found calling for repair. If the jury understood merely that they were not justified in finding an adequate and complete inspection unless satisfied by the greater weight of the evidence that it had occurred, no error was committed. We think they could not reasonably have understood the language used otherwise; and, while the instruction quoted is unfortunate and not to be approved as a general rule of law, we think it not prejudicially erroneous here.

Certain assignments of error upon admission of evidence present no ground for reversal nor justification for their discussion in this opinion. We cannot agree with appellant's contention that the damages are excessive.

By the Court.—Judgment affirmed.

TREGO, Respondent, vs. ROOSEVELT MINING COMPANY, Appellant.

September 9—September 29, 1908.

Sales: Warranty: Evidence: Appeal: Prejudicial error.

1. In a contract for the erection of a roasting and separating plant for a mining company, a guaranty that the plant would "handle twenty-five tons of mill concentrates from said second parties' mill, providing the same do not carry more than thirty per cent. iron and four per cent. calcium carbonate, in each twenty-four hours of steady running, and that the finished product from the process will not contain more than four per cent. iron," was in substance a warranty that the plant would so operate as to handle the specified quantity of raw ore *in a reasonably proper manner* to accomplish the purpose of the roasting process; and if the plant was so defective in operation as to fail to handle the ore properly and as to waste it, the express warranty was not complied with.
2. In an action to recover a balance of the agreed price of a roasting and separating plant plaintiff should not have been permitted, as a witness in his own behalf, to answer a question as to whether the plant was completed so as to fulfil all the guaranties, since this called for his opinion upon an ultimate issue in the case which was contested and could only be resolved by the jury; and the error was prejudicial where, upon his cross-examination, plaintiff having shown himself incompetent by want of knowledge, the court refused to strike out the testimony, but later in the trial excluded like questions put to defendant's witnesses.
3. Evidence of assays of ore, offered by plaintiff, was not competent to show that the plant complied with the warranty, where it was not shown that the ores assayed were from the mine in question, excepting one sample which was not of the kind and quality specified in the warranty.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This is an action to recover the balance of the contract price for the erection of a roasting and separating plant for the defendant, the *Roosevelt Mining Company.* The plaint-

iff, in consideration of $6,500, agreed to erect for defendant one complete roasting and separating plant as specified in the contract of sale. The roaster is spoken of as the "Trego" roaster. The contract provided that payment of parts of the contract price should be made at specified times during construction, and that the balance of $1,500 should be paid two weeks after the plant was completed and ready for operation. The purchase price, except $1,500, has been paid, and this action is to recover this balance.

The plaintiff claims that he furnished the roasting and separating plant called for by the contract, and that it fulfilled the conditions of the agreement; and demands the balance of the purchase price. One of the provisions of the contract was:

"Said first party guarantees that this plant will handle twenty-five tons of mill concentrates from said second parties' mill, providing the same do not carry more than thirty per cent. iron and four per cent. calcium carbonate, in each twenty-four hours of steady running, and that the finished product from the process will not contain more than four per cent. iron."

The defendant alleges that the roaster installed by the plaintiff failed to handle the amount of mill concentrates as agreed, and that it did not comply with the agreement for its erection, in that it was wholly unsuitable for the purpose for which it was designed, and alleges damages by way of counterclaim for the amount of money paid the men who were engaged by it while the plant was idle because of its defective operation, and for the value of great quantities of valuable ore which because of the alleged defective construction of the roaster were wasted and scattered through its smokestack. Defendant also asks the recovery of the amount paid on the price of the plant, it being alleged that the plant is worthless and without value.

The evidence adduced showed that the amount sued for

was the balance due on the purchase price. It also appeared that the plaintiff had constructed a roasting and separating plant of the kind specified in the contract, namely, a Trego roasting furnace, with magnetic separating machine. These, with the accompanying appliances, constitute the structures enumerated in the contract, and were erected, except that the motor installed was a seven and one-half instead of a ten-horse power.

The plaintiff was called and examined as a witness in his own behalf, and among other questions was asked:

"*Q*. There are certain guaranties contained in the contract. I will ask you whether your plant was completed so as to fulfil all of those guaranties? (Objection. No proper foundation. This is asking for a conclusion without stating the groundwork of the information or whether he knows facts sufficient to show that it complies with the guaranty or not.) Court: I presume you had better let the question be answered. (To which ruling defendant excepted.) You can cross-examine. *A*. I did."

Upon cross-examination the following proceeding took place:

"*Q*. When you state that you complied with the conditions of the guaranty, you rely on the representations of other people, do you not? *A*. And the chemists; yes, sir. *Q*. You didn't know that of your own knowledge? *A*. No, sir. Defendant's counsel: Then I ask that his evidence as to this mill complying with the guaranty be stricken out. Court: Well, it has been admitted. I cannot strike it out of the mind of the jury. This statement that it complied with the guaranty is not a statement made upon actual knowledge, but he has made that statement. Let that stand. It won't hurt the case at all. (To which ruling the defendant by its counsel then and there duly excepted.)"

There was no evidence in the case of analyses of mill concentrates of the quality specified in the contract which were furnished to the roaster and analyses of the roasted products from those mill concentrates. After the completion of the

plant a test was made of it and plaintiff thereafter reconstructed certain parts of it. There was evidence that the defendant used the plant for some time and that it offered to give a note for the balance of the purchase price. No instructions to the jury were given or requested upon the issues submitted to them. The jury returned a special verdict finding that the plant would handle the amount of ore specified in the time named and give a finished product as provided in the contract, provided the ore furnished was of the quality specified in the contract. This is an appeal from the judgment on the verdict in plaintiff's favor.

T. L. Cleary, for the appellant.

For the respondent there was a brief by *Kopp & Brunckhorst,* and oral orgument by *A. W. Kopp.*

SIEBECKER, J. The questions submitted in the special verdict show that the court held that plaintiff's action was to recover the balance of the purchase price for the roaster plant specified in the contract of the parties, and that defendant counterclaimed damages for a breach of the agreement that the plant, when completed, would "handle twenty-five tons of mill concentrates from said second parties' mill, providing the same do not carry more than thirty per cent. iron and four per cent. calcium carbonate, in each twenty-four hours of steady running, and that the finished product from the process will not contain more than four per cent. iron." The trial court correctly held that this agreement amounted to a warranty that the completed roaster would handle, in each twenty-four hours of its operation, the specified quantity of the quality of mill concentrates described in the contract, and produce a finished product which would not contain more than four per cent. of iron. The phraseology of this agreement imports, in substance, that the roaster would so operate as to handle this quantity of raw ore in a reasonably proper manner to accomplish the purpose of the roast-

ing process. If the plant was so defective in its operation as to fail to properly handle the ore and as to waste it, then the plant cannot be said to comply with the express warranty. *Fuller-Warren Co. v. Shurts,* 95 Wis. 606, 70 N. W. 683. The parties do not question but that plaintiff furnished a "Trego" roasting plant of the kind called for by the contract. It appears that this appliance was one reasonably well known in the mining business and well known to the parties when they contracted. The defendant alleges and claims that the roaster did not comply with the warranty, and seeks to recover damages by way of counterclaim to plaintiff's demand for breach of this express warranty. The issue thus raised was litigated and submitted for determination to the jury by a special verdict. The jury found that the roaster furnished fulfilled the warranty, and judgment was awarded plaintiff of a recovery of the balance due on the contract.

Numerous exceptions to the reception and rejection of evidence are alleged by defendant for reversal of the judgment. As appears in the foregoing statement of the facts, one of the interrogatories propounded to plaintiff while testifying in his own behalf was whether the plant was completed so as to fulfil all of the guaranties. The court permitted an answer to this question over defendant's objection. Defendant's cross-examination of the witness disclosed that plaintiff had no direct knowledge on the subject and relied on information obtained from others. The court denied defendant's motion to strike out the evidence, upon the ground that the effect of its reception could not thereby be removed and that the evidence was harmless. We find no justification in the bases assigned for this ruling. The witness had shown himself to be incompetent by his want of knowledge, even if the interrogatory were a proper one. But it appears that the inquiry called for his opinion upon an ultimate issue in the case which was sharply contested and which could only be resolved by a jury. *Johnson v. Highland,* 124 Wis. 597, 102

N. W. 1085. Later in the trial defendant propounded like questions to witnesses called by it, and the court upon objection ruled against them. These contradictory rulings would naturally tend to give emphasis and weight to plaintiff's evidence on the subject and render its reception prejudicial to the defendant's case. We are constrained to hold that this constitutes reversible error in the case.

Another exception urged by defendant is to the evidence of assays of ore made by the witness Pennington. It is claimed that the samples of ore furnished him were not sufficiently identified and that the written reports of his assays were not the originals. So far as the record discloses, these reports contained a statement of the memoranda made by him as he proceeded in his work and contained original records or written statements of the result of his examinations. The evidence, however, is subject to the other objection urged, in that it is not shown that, with one exception, the samples of ores furnished to him or that the samples tested by him were from the Roosevelt mine, and this one does not conform to the kind and quality of ore specified in the warranty and which plaintiff guaranteed that the mill would handle. Under these circumstances the plaintiff's assays were not competent as evidence tending to show that the roaster complied with the warranty, and they should not have been received for this purpose.

Defendant claimed that plaintiff had failed to comply with the contract by not furnishing a ten-horse power electric motor. The plaintiff testified that only a seven and one-half horse power motor had been furnished, that this was of sufficient power, and was what the parties understood he should furnish. This matter was not fully explained by other evidence, and neither party insisted on a determination of it by either the court or the jury. Under this state of the record no question is presented for review.

Since the errors above noted call for a new trial, we need

not consider other exceptions to rulings on evidence which are not likely to arise upon another trial.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

LIKENS and others, Appellants, vs. LIKENS and others, Respondents.

September 9—September 29, 1908.

Equity: Action to establish title to land: Laches.

1. The defense of laches does not depend upon any statute of limitation, but is in the nature of an equitable estoppel barring the right to maintain an action by those who unduly slumber upon their rights.
2. There is no fixed rule as to the lapse of time necessary to bar a suitor in equity. Great lapse of time, if reasonably excused and without damage to the defendant, has been ignored; while slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of defendant's position, has been held sufficient.
3. After foreclosure of a mortgage given by the widow and heirs of an intestate, two of the heirs (defendants herein) bought the land for themselves from the purchaser at the foreclosure sale, and thereafter held it as their own, to the knowledge of all persons interested. After such purchase defendants mortgaged the land and appropriated to their own use the rents, issues, and profits thereof. A third heir, who knew of the purchase and that defendants claimed title adverse to him, acquiesced therein, and during the period of more than nine years until his death made no claim against them. After his death, and more than ten years after the purchase by defendants, the widow and heirs of said third heir brought this action to establish title to a share in the land and for an accounting, etc. During said ten years the land had increased in value four or five fold. No sufficient excuse for the delay was shown. *Held*, that the action was barred by laches.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action was brought to establish the title of the plaintiffs to certain lands in Grant county, Wisconsin, and for an accounting and partition. The answer, among other defenses, sets up laches and alleges ownership and possession from the 18th day of April, 1896, and that such possession had been continuous, open, notorious, and exclusive of all rights, claims, or title of any person, and hostile to the claim of the plaintiffs and W. W. Likens, the person under whom plaintiffs claim. The findings made and filed by the court below give a history of the material facts.

The court found substantially that on November 17, 1889, James Likens died intestate, leaving him surviving Artella Likens, his widow, and the following children: W. W. Likens, James Likens, *Benjamin F. Likens, Sarah Jane Arnett, Josephine McGinnis, Emma I. Dilger,* and *Tilla A. Likens;* that his son *Benjamin F. Likens* was appointed administrator in March, 1900, by the county court of Grant county, Wisconsin; that said administrator never filed a report and that the estate has never been settled; that said James Likens died seised of 232 acres of land in Grant county, upon which was an outstanding mortgage to James Miles of $250, dated February 28, 1880; that in 1891 a large barn was built on said premises at a cost of over $1,600; that said barn was built largely under direction and request of W. W. Likens, who promised to furnish the money to pay for the same, and, said barn not being paid for, liens were filed thereon in 1902 on a portion of said land in favor of William H. Schmitz for $249 and Kendrick & Wallenhorst for $709.65; that an action was brought to foreclose the lien of Kendrick & Wallenhorst in 1892, and in September of said year the widow and then surviving heirs of James Likens executed a mortgage to T. L. Cleary for the sum of $1,100 to pay said liens; that said mortgage was duly recorded, and covered all the land of which deceased died seised and the following additional land of *Benjamin F. Likens:* the S. E. ¼ of N. W. ¼ of section

17, and the S. W. ¼ of the S. W. ¼ of section 17, all in township 3, range 2 W.; that said mortgage was signed by Artella Likens (widow), *Benjamin F. Likens, Sarah Jane Arnett,* W. W. Likens, *Josephine McGinnis, Emma I. Dilger,* and *Tilla A. Likens;* that James Likens, Jr., died in 1890, leaving him surviving a widow and three minor children, who did not join in said mortgage; that the proceeds of the mortgage to Cleary were used to pay the indebtedness on the barn built upon the lands of the deceased. The court further found that in 1894 said Cleary mortgage, having been duly assigned to C. H. Eighmy, was foreclosed, and judgment docketed thereon November 14, 1894, and thereafter the lands were sold by the sheriff in accordance with said foreclosure on March 6, 1896, to John F. Miles for $1,551, and a deed to said lands made by the sheriff to said Miles and duly recorded; that the land in question at a forced sale was not worth more than it was bid in for by said Miles; that the defendants *Benjamin F. Likens* and *Tilla A. Likens* did all they could preliminary to the foreclosure sale to induce others interested in said lands to come in and help them pay off the mortgage and save the land; that they failed in their endeavor, and all the parties interested knew that the land was to be sold and disposed of at a foreclosure sale; that John F. Miles bought the land for himself, but through his friendship for *Benjamin F. Likens* and *Tilla A. Likens* proposed to quitclaim it to them and take a mortgage back for the balance of the purchase money that they were unable to pay; that this transaction was in good faith, and *Benjamin F. Likens* and *Tilla A. Likens* on April 18, 1896, bought all the land described in said mortgage of John F. Miles for themselves, and have ever since April 18, 1896, held it as their own under said deed and to the knowledge of every one interested in the land prior to the foreclosure sale. The court further found that W. W. Likens was a son of James Likens, deceased, and said W. W. Likens died in September,

1905, and that the plaintiffs are his widow and heirs, and that plaintiffs in this action, at the time of the death of W. W. Likens and ever since, have been nonresidents of the state of Wisconsin; that W. W. Likens, soon after said Miles deeded said lands to *Benjamin* and *Tilla Likens,* knew that they were the owners and claimed title thereto adverse to him, and never at any time during the nine remaining years of his life questioned their title as absolute owners of this land; that W. W. Likens was a lawyer, had practiced over thirty years, but did not reside with plaintiff, his widow, for more than twenty years before his death; that during the last four years of his life he was an invalid and was taken care of by *Benjamin F. Likens* and *Tilla A. Likens,* and that reasonable compensation for his board and attendance given him at that time would be $1,000; that none of the defendants in this action ever appeared or answered except *Benjamin F. Likens* and *Tilla A. Likens,* and none of the other defendants has ever made any claim to an interest in these lands described in the complaint since March 6, 1896; that John F. Miles on April 18, 1896, made a quitclaim deed to *Benjamin F. Likens* and *Tilla A. Likens* of the lands described therein, and said deed was duly recorded; that said deed conveyed all the lands deeded to him in said sheriff's deed except the S. E. ¼ of the N. W. ¼ of section 16, township 3, range 2 W.; that the said lands had been purchased by said Miles on March 6, 1896; that the heirs of James Likens, Sr., had no title or interest in and to the lands of which he died seised (excepting the heirs of James Likens, Jr., deceased) from March 6, 1896, to April 18, 1896, when said lands were purchased from said Miles by *Benjamin F. Likens* and *Tilla A. Likens;* that the time for redemption under the Eighmy mortgage expired November 14, 1895; that the defendants *Benjamin F. Likens* and *Tilla A. Likens* fully informed the other heirs of James Likens, deceased, of all the facts as they occurred, and informed them that they were unable to redeem said lands from said foreclosure sale,

and endeavored to secure the assistance of the heirs in raising money to do so; that thereupon all the other heirs of James Likens, deceased, abandoned all effort on their part to redeem said lands or repurchase the same, and *Benjamin F. Likens* and *Tilla A. Likens* informed all the heirs that they were going to try and buy back the land in their own names and for their own benefit, and that all of the heirs acquiesced in this arrangement, and one of them, W. W. Likens, in a letter soon after the purchase, stated that he was glad to know they had bought the land in their own names; that at the time of the purchase from said Miles by *Benjamin F. Likens* and *Tilla A. Likens* the other heirs of James Likens, Sr., who signed the mortgage had no interest whatever in said lands and had lost the same by the foreclosure proceedings, and *Benjamin F. Likens* and *Tilla A. Likens* purchased said lands from Miles for their own sole use and benefit, as the heirs of James Likens, Sr., well knew; that during the last ten years the lands in controversy have greatly increased in value and are now worth four or five times what they were at the time of purchase by defendants; that if the plaintiffs, or their ancestor from whom they claim title, W. W. Likens, ever had any claim, there had been unreasonable delay on his part in claiming or establishing his claim to said lands.

As conclusions of law the court found that the plaintiffs have established no cause of action and the complaint should be and is dismissed upon the merits, and the defendants *Benjamin F. Likens* and *Tilla A. Likens* recover their costs of the plaintiffs in this action. Judgment was so ordered and entered upon the findings of fact and conclusions of law, dismissing the complaint and for costs, from which judgment this appeal was taken.

For the appellants there was a brief by *Bushnell, Watkins & Moses,* and oral argument by *A. R. Bushnell* and *R. A. Watkins.*

T. L. Cleary and *E. M. Lowry,* for the respondents.

KERWIN, J. It is strenuously contended by appellants that the sale to Miles under the foreclosure suit and transfer of the land by him to *Benjamin F. Likens* and *Tilla A. Likens* (hereinafter called defendants) did not vest the absolute title in said defendants as against W. W. Likens, under the doctrine that a cotenant cannot purchase an outstanding title or incumbrance affecting the common estate for his own exclusive benefit and assert such right against other cotenants. We do not regard it necessary to discuss this question, because we are convinced that the defense of laches is supported by the findings and evidence, and therefore the judgment must be affirmed on that ground regardless of other questions discussed by counsel. The court found upon sufficient evidence that on March 6, 1896, Miles bought the property in question at foreclosure sale and recorded his deed, and on April 18, 1896, defendants bought from Miles and ever since have held the land as their own under the deed from Miles, to the knowledge of all parties interested; that soon after the sale to defendants W. W. Likens knew defendants were the owners and claimed title adverse to him and never afterwards denied that they were the owners; that during the ten years immediately preceding the commencement of this action the lands greatly increased in value, and were at the time of commencement of this action worth four or five times what they were when purchased by defendants. It further appears from the record that in August, 1895, W. W. Likens wrote to defendant *Tilla A. Likens,* saying that he was not expecting to realize anything from the property, and afterwards and on May 24, 1896, again wrote saying he was pleased that she and *Benjamin* had the property in their own names; that after the purchase from Miles the defendants mortgaged the land and took the rents, profits, and issues thereof and converted the same to their own use; that this action was commenced August 10, 1906. It therefore appears that for more than nine years after the purchase

from Miles and up to the time of his death W. W. Likens took no steps to assert his claim against the defendants, if he had any, and the present action was not commenced for more than ten years after defendants purchased the land, and no sufficient excuse was shown to excuse the delay. We think it clear, therefore, that upon the findings and evidence the defense of laches was established. *Rogers v. Van Nortwick,* 87 Wis. 414, 58 N. W. 757; *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996; *Fleming v. Ellison,* 124 Wis. 36, 102 N. W. 398.

The defense of laches does not depend upon any statute of limitation, but is in the nature of an equitable estoppel, and operates as a bar upon the right to maintain an action by those who unduly slumber upon their rights. There is no fixed rule as to the lapse of time necessary to bar a suitor in a court of equity. Each case must stand upon its own particular facts. Great lapse of time, if reasonably excused and without damage to the defendant, has been ignored; while slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of defendant's position, has been held sufficient. *McCann v. Welch, supra; Hammond v. Hopkins,* 143 U. S. 224, 12 Sup. Ct. 418. And it has been held that unreasonable delay in bringing an action in equity will bar recovery where the other party has made improvements in the meantime or the property has greatly increased in value. *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Johns v. Norris,* 22 N. J. Eq. 102. In the case before us there was unreasonable delay in bringing the action and no sufficient excuse for such delay shown; also acquiescence in the title and claim of defendants, besides a four or five fold increase in the value of the property during the delay. Under such circumstances equity will not grant relief. In addition to the cases before cited we call attention to the following: *Brittin v. Handy,* 20 Ark. 381; *Mandeville v. Solomon,* 39 Cal. 125; *Buchanan v. King's Heirs,* 22 Grat.

414. In the cases last cited it was held that where a tenant in common buys in an outstanding title, if his cotenant desires to avail himself of the benefit of the purchase he must act promptly and make his election to claim the benefit of the purchase and contribute to the expense incurred in the purchase.

It follows that the judgment dismissing the complaint was right and must be affirmed.

By the Court.—The judgment of the court below is affirmed.

ANDERSON, Administratrix, Respondent, vs. ANDERSON, Appellant.

September 9—September 29, 1908.

Witnesses: Competency: Transactions with person since deceased: Order of proof: Surrebuttal.

1. In an action by an administratrix upon notes given to her intestate, the defendant was incompetent, in the first instance, under sec. 4069, Stats. (1898), to testify to a transaction or communication personally had with the intestate; but when the plaintiff, in rebuttal, examined witnesses as to such a transaction, defendant's disqualification or incompetency as to that particular transaction was removed and he had the right to testify concerning the same on surrebuttal.
2. The ordinary rule as to the order of proof, being a mere rule of convenience, must in such a case yield to the rule of the statute, and defendant's testimony should not be excluded on the ground that it is not rebuttal.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *L. H. Bancroft,* and for the respondent on that of *F. W. Burnham.*

Among other references upon the part of the appellant

were the following: Sec. 4069, Stats. (1898); *Daniels v. Foster,* 26 Wis. 686; *Belden v. Scott,* 65 Wis. 425, 27 N. W. 356; *Stewart v. Stewart,* 41 Wis. 624; *Adams v. Allen,* 44 Wis. 93; *Page v. Danaher,* 43 Wis. 221; *Sawyer v. Choate,* 92 Wis. 533, 66 N. W. 689; *Harrington v. Priest,* 104 Wis. 362, 80 N. W. 442; *Allen v. Chippewa Falls,* 52 Wis. 430, 9 N. W. 284; *Ward v. Henry,* 19 Wis. 76; *Gores v. Graff,* 77 Wis. 174, 46 N. W. 48; *McArthur v. Slauson,* 53 Wis. 41, 9 N. W. 784; *David v. Birchard,* 53 Wis. 492, 10 N. W. 557; *Fisher v. Shelver,* 53 Wis. 498, 10 N. W. 681; *U. S. Exp. Co. v. Jenkins,* 64 Wis. 542, 25 N. W. 549; *Imhoff v. C. & M. R. Co.* 20 Wis. 344; *Randall v. N. W. Tel. Co.* 54 Wis. 140, 11 N. W. 419.

TIMLIN, J. The parties are sister and brother, children of John J. Anderson, deceased, and the respondent is his administratrix. She found among the effects of deceased six notes signed by the appellant and payable to the deceased, all bearing date January 1, 1893, all to draw interest from January 1, 1896, one payable in five, one in six, one in seven, one in eight, one in nine, and one in ten years after date. The four notes first maturing were for $100 each and the two last maturing for $200 each. The trial court held that the two notes first maturing were barred by the statute of limitations and no question is made upon this ruling. Judgment against the appellant was rendered in favor of the administratrix upon the other four notes.

After the plaintiff had offered evidence, exclusive of some evidence properly ruled out because relating to transactions with John J. Anderson, deceased, tending to show that on October 11, 1892, the deceased conveyed to the appellant by warranty deed a certain piece of land for $1,600, and the appellant on the same day executed back to the deceased a mortgage for the sum of $1,000, and that the notes in question and this deed were in the handwriting of one White, and

that notwithstanding the discrepancy in date and other discrepancies the notes aforesaid were the notes secured by the mortgage aforesaid, the appellant offered in evidence an instrument satisfying the mortgage and bearing date September 26, 1904. Appellant also offered evidence tending to show the execution of the instrument of satisfaction and that the deceased in his lifetime admitted that he had had a settlement with appellant and therefore would sign the satisfaction. Testimony in rebuttal was offered by the respondent tending in some measure to controvert the testimony of defendant's witnesses relative to the transaction of settlement with deceased. The testimony on this point relates to what was said and omitted to be said and to the condition of the decedent at the time of the execution of the satisfaction, which took place in the presence of the appellant and one Dr. Booher and the heirs at law, William J. Anderson and Madge Lee. The latter testified:

"I remember of Mr. Herlihy and Dr. Booher and my brother John being there with a paper two days before he died. I was present at the time they were there. There was no conversation between my father and Dr. Booher. *Q.* Was your father able to talk at all? *A.* He was not able to talk loud. He could merely motion. He could just make a sound."

William J. Anderson, on the part of the respondent, also gave some testimony regarding this transaction of signing the satisfaction piece. At the close of respondent's rebuttal evidence the appellant was recalled and asked whether at the time of the execution of the satisfaction of the mortgage he was present, and whether he heard his father have any conversation with Dr. Booher. This was objected to as not rebuttal and the objection was sustained.

The appellant contends that it was error to strike out the evidence of *John C. Anderson* on surrebuttal. *John C. Anderson* was a party to this action and therefore incompetent,

under sec. 4069, Stats. (1898), to testify to transactions or communications personally had with John J. Anderson, deceased. The trial court properly excluded his evidence concerning such transactions and communications in the first instance. In any action, before the plaintiff has given, or has been permitted to give, his testimony with reference to a transaction or communication by him had with such deceased person as is described in sec. 4069, Stats. (1898), if the defendant examine witnesses concerning the same transaction (whether the defendant's witnesses so examined are competent or not), the plaintiff has by force of this statute his disqualification or his incompetency as to that particular transaction removed and he may testify concerning it. It would be quite unjust and contrary to the provisions of sec. 4069, Stats. (1898), to permit the plaintiff in rebuttal of the defendant's defense to produce witnesses to such transaction or communication and then deny the defendant's right to testify concerning this same transaction on surrebuttal. The defendant was first made competent by the act of the plaintiff in introducing witnesses upon this subject in rebuttal, and the rule of the order of proof, being a mere rule of convenience, must yield to the rule of the statute.

For the error in excluding the testimony of the defendant in surrebuttal concerning this transaction with the deceased the judgment must be reversed.

By the Court.—The judgment of the circuit court is reversed, with costs, and the cause remanded for a new trial.

SCHOENMANN and another, Appellants, vs. WHITT, Respondent.

September 9—September 29, 1908.

Brokers: Contracts: Mutuality: Acceptance.

A writing whereby in terms defendant gave plaintiffs the exclusive right to sell his land and agreed to pay them a commission in the event of a sale was signed by defendant but not by plaintiffs, and contained no stipulation requiring plaintiffs to do anything. Defendant afterwards sold the land without any assistance from plaintiffs. *Held*, that plaintiffs could not recover a commission on such sale in the absence of a showing that they had accepted the implied obligations of the writing on their part by using ordinary diligence in endeavoring to make a sale. TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action is brought to recover a commission of $270 claimed to be due upon the sale of a farm. The alleged contract upon which recovery is sought was lost, but what purported to be a copy of at least the material portion of it was produced, and offered and received in evidence, and is as follows:

"Spring Green, Wis., Oct. 14, 1904.

"I hereby grant unto Schoenmann & Son the exclusive right to sell and to enter into a contract for the conveyance of the property described on the opposite side of this card, and authorize them to list the same for sale upon the terms and conditions mentioned, and agree to pay said Schoenmann & Son, in the event of a sale of said property, the regular commission of two and one-half. I however reserve the right to revoke this agreement by giving said Schoenmann & Son ninety days' notice in writing.

"(Signed) JOHN L. WHITT."

The foregoing writing was not signed by the plaintiffs or either of them. The defendant asserted that the written

memorandum did not express the entire agreement, and that it should be reformed so as to exempt him from the payment of any commission in the event of his making a sale of the farm himself. The court, on disputed testimony, refused to reform the instrument and found that the agreement was fully expressed in the writing. Some three weeks after the signing of the written memorandum the defendant sold the farm, without any aid or assistance from the plaintiffs, for a price in excess of what they were authorized to sell for. He refused to pay any commission because of such sale.

A jury was waived and the case was tried by the court. The trial court found that plaintiffs had not exhibited the farm in question to any purchaser, had not taken any steps to sell the same, and had not incurred any expense in reference thereto, except to talk with one person about it, to whom they expected to show it, but before doing so they learned it was sold, and that the contract lacked mutuality and therefore never had any binding force or effect; and awarded judgment dismissing complaint, from which judgment this appeal is taken.

For the appellants the cause was submitted on the briefs of *Thomas W. King* and *Grotophorst, Evans & Thomas.* They cited *Metcalf v. Kent,* 104 Iowa, 487, 73 N. W. 1037; *Ingold v. Symonds,* 125 Iowa, 82, 99 N. W. 713; *Mott v. Ferguson,* 92 Minn. 201, 99 N. W. 804; *Dole v. Sherwood,* 41 Minn. 535, 43 N. W. 569; *Goward v. Waters,* 98 Mass. 596, 598; *Lapham v. Flint,* 86 Minn. 376, 90 N. W. 780, 781; *Arnold v. Nat. Bank,* 126 Wis. 362; 9 Cyc. 300, 333; *Stensgaard v. Smith,* 43 Minn. 11, 44 N. W. 669.

For the respondent the cause was submitted on the brief of *Richmond, Jackman & Swansen.* To the point that the contract was void for want of mutuality, they cited *Greve v. Ganger,* 36 Wis. 369; Bishop, Contracts, § 78; 1 Parsons, Contracts (9th ed.) 486 (*449), note; 1 Page, Contracts, § 304, p. 452; Hammon, Contracts, § 337, p. 682; *Hoffman*

v. Maffioli, 104 Wis. 630; *Teipel v. Meyer,* 106 Wis. 41; *Stensgaard v. Smith,* 43 Minn. 11, 44 N. W. 669; *Hirschhorn v. Nelden-Judson D. Co.* 26 Utah, 110, 72 Pac. 386; *Kolb v. J. E. Bennett L. Co.* 74 Miss. 567, 21 South. 233; *Walker v. Denison,* 86 Ill. 142; *Cold Blast T. Co. v. Kansas City B. & N. Co.* 114 Fed. 77, 57 L. R. A. 696; *A. Santaella & Co. v. Otto F. Lange Co.* 155 Fed. 719, 722.

BARNES, J. It is perfectly apparent that the signing of this paper by the defendant did not make a contract. It was not signed by the plaintiffs and contained no stipulation requiring them to do anything. At the time of its delivery to the plaintiffs it was entirely lacking in mutuality. The plaintiffs might have accepted the implied obligations of the writing on their part by doing the work and incurring the expense that such writing contemplated should be performed and incurred, and such acceptance, so made, would result in a binding contract. *Arnold v. Nat. Bank,* 126 Wis. 362, 365, 105 N. W. 828; *Hooker v. Hyde,* 61 Wis. 204, 207, 21 N. W. 52; *Superior C. L. Co. v. Bickford,* 93 Wis. 220, 67 N. W. 45; *Goward v. Waters,* 98 Mass. 596, 598; *Lapham v. Flint,* 86 Minn. 376, 90 N. W. 780, 781.

The implied obligation contemplated by the writing required plaintiffs to use ordinary diligence in endeavoring to make a sale of the property, and the burden was upon them to show that such diligence had been exercised by them. The inherent weakness of the plaintiffs' case was their failure to show that they had in good faith assumed and carried out their part of the obligation before the defendant consummated a sale of the property without assistance of any kind from them.

There is no finding as to the time that elapsed between the signing of the memorandum by the defendant and the sale of the farm by him. There is no finding, and no evidence, that any expense was incurred by the plaintiffs in connection with the sale of the lands. There is no proof that any par-

ticular time was spent or effort was made by plaintiffs in endeavoring to effect a sale, except as appears in the findings of the court. There is an express finding by the court that plaintiffs "had not exhibited said farm to any purchaser or taken any steps to sell the same or incurred any expense therein, except that the plaintiff *John Schoenmann* had talked to one person with respect thereto, and expected to exhibit said farm to said person, but before doing so was notified by the defendant that the farm was already sold." How long this conversation took place after the writing was signed by the defendant does not appear. Neither does it appear whether the conversation was merely casual, or whether time and effort were consumed in looking up this particular person, or whether he had the ability or inclination to purchase the farm in question, or why he had not looked it over before the sale was made. The finding of the court negatives the idea that the plaintiffs had accepted their obligation by using any reasonable degree of diligence to make the sale of the farm. It is true the plaintiffs claim that the finding of the court in respect to efforts used by them to sell the farm is not a correct summary of, or conclusion to draw from, the testimony in the case. The finding seems to embody every material thing that was testified to on the trial, with the possible exception of some evidence showing that one of the plaintiffs had communicated to the defendant the information that they expected to have a prospective purchaser look at the farm. It is very doubtful if this question is preserved by any proper exception to the findings of fact made by the court, but we do not deem the evidence of sufficient importance to change the result of our decision in any event.

By the Court.—Judgment affirmed.

TIMLIN, J. (*dissenting*). The contract was one for services in which the consideration necessary to support the contract is not the performance of the services but the agreement

to so perform. I think there was an acceptance of the written contract by the plaintiffs, hence an agreement upon their part to perform. The opinion of the court seems to me to be in conflict with elementary principles of the law of contracts, and to confound failure to perform with lack of consideration.

BREW, Appellant, vs. NUGENT and another, Respondents.

September 10—September 29, 1908.

Boundaries: Evidence: Weight and sufficiency: Original monuments: Courses and distances: Old fences: Instructions to jury.

1. In controversies as to the location of corners or boundaries of lots or blocks in platted lands, the original location of monuments must prevail over the courses and distances marked on the plat.
2. If the monuments have disappeared their original location is to be determined by the best evidence available; and in such case location of the disputed points by means of measurements by courses and distances is evidentiary only, and its weight depends upon circumstances.
3. Where the original markings of a block had been removed many years before the controversy as to the south boundary line of a lot arose, evidence of the construction of a fence designed to be on the north line of the lot so soon after the original survey as to render it probable that the monuments were then in place or their location readily ascertainable, and evidence of acquiescence in the location of such fence for some thirty or forty years, was competent and, with other evidence, was sufficient to warrant the conclusion that the fence was properly placed, notwithstanding evidence of a surveyor to the contrary based on measurements from supposedly original monuments in other blocks.
4. Instructions to the jury in such case directing them to give primary and controlling evidentiary effect to the old fence line if they were satisfied that when built it accorded with the original survey, and calling the jury's attention to the undisputed facts and the testimony on the subject, are *held* not to have given undue significance to the old fence line.

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Ejectment to recover a strip of land two feet on the east side, seven feet on the west side, and 150 feet long as a part of lot 12 and the north one-third of lot 17, block 11, of the Union plat of Prairie du Chien. The dispute was as to the location of the south boundary line of lot 12 and north one-third of lot 17.

There was evidence to this effect: A fence, built about the year 1863, displacing a fence previously built, was designed to be located on the north line of lots 12 and 17. None of the original monuments placed to mark the corners of block 11 had existed for many years before the controversy arose. A fence was erected in 1884 fifty feet south of the north fence, and the two fences were regarded by all parties concerned from the time they were built till about the time of the commencement of the action as marking the north and south boundary of lot 12 and the north one-third of lot 17. There was no proof as to whether the fence displaced as aforesaid was built before or after the platting of the land, which occurred in 1856, and no proof as to what efforts the person who built the fence in 1863 made to locate it, though he testified that he built it on the line as near as he could. The general effect of the evidence was that if the fence erected in 1863 was properly placed, the disputed premises were south of the south boundary of plaintiff's land and within the boundaries of defendant's land. Measurements made by a competent surveyor, from monuments supposed by him to be originals set to mark the corners of other blocks than the one in question, located the north line of plaintiff's premises sufficiently south of the fence line of 1863 to show that the south line of such premises was south of the strip of land in dispute and thus indicate that such strip was the property of the plaintiff. There was evidence of some cir-

cumstances corroborative of the claim that the 1863 fence was correctly located, as well as evidence of circumstances to the contrary. The cause was submitted to the jury so as to turn on whether the old 1863 fence was correctly placed or not. The verdict was in favor of the defendant and judgment was rendered accordingly.

Alexander Athey, for the appellant.

J. P. Evans, for the respondent.

MARSHALL, J. The following propositions are affirmed and submitted by appellant's counsel as grounds for a reversal: (1) The verdict and finding that the fence as constructed for the north boundary of lots 12 and 17 some thirty or forty years before the controversy arose was properly placed is not supported by any credible evidence. (2) The court in instructing the jury gave prejudicial significance, as evidence, to the location and maintenance of the fence referred to. We will consider such propositions briefly.

It is the settled law that in controversies as to the proper locations of corners or boundaries of lots or blocks in platted lands the original location of monuments must prevail, regardless of whether the same coincide with the courses and distances laid down on the plat, and that in determining such locations if such monuments have disappeared they must be established by the best evidence the nature of the situation is susceptible of. So, in such circumstances, where careful measurements by courses and distances would presently locate the disputed points is not controlling. It is evidentiary only, and of controlling or little or no weight according to circumstances. *Nys v. Biemeret,* 44 Wis. 104; *Lampe v. Kennedy,* 49 Wis. 601, 6 N. W. 311; *Racine v. J. I. Case P. Co.* 56 Wis. 539, 14 N. W. 599; *Racine v. Emerson,* 85 Wis. 80, 55 N. W. 177; *Madison v. Mayers,* 97 Wis. 399, 73 N. W. 43; *Galesville v. Parker,* 107 Wis. 363, 83 N. W. 646; *Smith v. Beloit,* 122 Wis. 396, 100 N. W. 877; *Pereles v.*

Gross, 126 Wis. 122, 105 N. W. 217. Failure to fully appreciate the effect of such decisions might well lead one who relies on mere measurements from monuments supposed to have been set in making the original survey to mark corners of lots or blocks other than the ones in question, to lose patience, as counsel for appellant seems to have done, because of evidentiary effect inconsistent therewith being given to the location of ancient fences and long-continued occupation with reference thereto and other circumstances.

The original markings of the block in question having been removed, as they unquestionably were, many years before the controversy arose, the evidence as to the construction of the fence designed to be on the north line of lots 12 and 17 at a time so near that of the original survey as to render it quite probable that they were then in place, or their location readily ascertainable by a person of ordinary intelligence and experience, and the evidence of acquiescence in the location of such fence for some thirty or forty years, was competent, and at least with other evidence offered and received, particularly evidence that a stone existed at the easterly end of such fence some years after it was constructed, which people regarded as a landmark, was sufficient to warrant the conclusion that such old fence was properly placed and the disputed boundary fifty feet south of it, notwithstanding the very positive evidence of the surveyor, who, by his measurements from monuments located some distance from the vicinity of the lost corner, supposed by him to be monuments set in making the original survey, supported appellant's contention. In such a case such circumstantial evidence may have so much greater probative force than mere measurements by courses and distances as to prevail over the latter as matter of law, as indicated in some of the cases cited.

What has been said perhaps sufficiently answers the contention of counsel that the court gave unwarranted significance to the circumstances referred to. The jury were

merely informed, as the fact was, and is not disputed by counsel, that, if the ancient fence when built was correctly placed with reference to the original monuments marking the north boundary of the block in question, then the line and corner so indicated should prevail over the one indicated by the surveyor by measurements from distant monuments supposed to have been placed to mark the corners of other blocks. That is, under the circumstances, primary and controlling evidentiary effect was directed to be given to the old fence line, in case the jury became satisfied by a preponderance of the evidence that when the fence was constructed it accorded with the original monuments set on such line; otherwise primary and controlling effect was directed to be given to the measurements made by the surveyor, the attention of the jury being called to the undisputed fact that the fence was constructed so soon after the land was platted as to render it reasonable to suppose that some of the monuments indicating the true line were still in place, but calling attention to the circumstance that the person who built the fence merely testified that he ascertained the line as near as he could, not being interrogated on either side as to what steps he took in that regard.

We are unable to discover that the court gave the undue significance to the old fence line claimed by counsel. It was fairly left to the jury to determine from the whole evidence whether the fence was built so as to accord with the original survey, with instructions that, if they determined it was, from a preponderance of the evidence, the finding would be controlling, since the disputed strip was by the uncontroverted evidence on defendant's side of a line located at the proper distance from such old fence line. That was certainly correct, and the fact that the jury were, with considerable particularity, instructed in that regard, so as to leave no room for them to proceed on any false theory, is commendable rather than subject to criticism.

By the Court.—The judgment is affirmed.

BANDEKOW, by guardian *ad litem*, Respondent, vs. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

September 10—September 29, 1908.

Railroads: Negligence: Injury to pedestrian from bucket attached to car: Custom.

Plaintiff, while walking beside defendant's railway track, was struck on the head by a bucket attached to the side of a freight car in a passing train. The bucket, nine and one-half inches in diameter, did not project more than seven inches beyond the ladder on the side of the car and, being on an ordinary box car, did not project laterally beyond the track so much as some of the larger cars which are usually present in freight trains. It was a general custom on this and other railroads to carry a bucket in this way for use in treating hot boxes. *Held*, that the carrying of the bucket in such position did not constitute negligence.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Defendant's railroad ran northerly and southerly through the village of Cassville, Wisconsin, and for several blocks was laid about the center of Front street, elsewhere one of the important streets, but within the block in question substantially uninhabited and untraveled except by pedestrians. About five feet west of the track was a row of posts eighteen inches high supporting semaphore wires. The ordinary course of travel for pedestrians was on the track or upon the ballast close to the ends of the ties, and on the west side was between the track and these semaphore wires. On the day in question a long freight train was proceeding northward on this track, and plaintiff, a boy nine and one-half years old, started to walk in the same direction between the wires and the track. According to the plaintiff and the verdict he was struck on the head by a "dope pail" attached to the side of one of the cars, knocked down, and severely injured. The jury found, by special verdict, that the presence of the dope pail on the side of the car constituted negligence on the part

of the defendant and that such negligence was the proximate cause of the plaintiff's injury. Motions to set aside and reverse the answers to these questions were overruled, and judgment entered upon the verdict for the damages found, from which the defendant appeals.

For the appellant there was a brief by *Woodward & Lees,* attorneys, and *Lowry & Carthew,* of counsel, and oral argument by *G. M. Woodward.*

For the respondent there were briefs by *Clementson & Philipson,* and oral argument by *G. B. Clementson.*

DODGE, J. Among some sixty-nine assignments of error is presented one question the answer to which, as we have determined upon it, is so conclusive not only of this appeal but of the final merits of the case that we shall rest the decision thereon without discussing the other assignments. That question is whether there is any evidence which can justify the affirmative answers of the jury to the two questions of the special verdict mentioned in the statement of facts, namely, whether the defendant was guilty of negligence in having the bucket upon the side of the car, and whether such negligence was the proximate cause of the plaintiff's injury. This bucket was nine and one-half inches in diameter. The method of attachment was by hanging the loose bail over a hand-rail in the ladder upon the side of the car, thrusting through the bail upon the inside of the round and down into the bucket a long rod of iron, which served to hold the bucket substantially against the side of the car. The ladder projected from the side of the car approximately three inches, and thus the bucket projected six and one-half or seven inches beyond the ladder, and it is very apparent from the testimony of plaintiff's two witnesses who professed to have seen the bucket that it was upon an ordinary box car, perhaps not the smallest but certainly not one of the unusually large type, such as furniture or refrigerator cars.

This train, as do nearly all long trains, contained cars of various sizes, ranging from the old-fashioned box cars carrying about 40,000 pounds capacity up to the large furniture and refrigerator cars. It was undisputed in testimony that a 50,000-pound capacity car extends nineteen inches outside of the rail, while the largest cars of 100,000 pounds capacity extend thirty-one inches. It was also in evidence, without dispute, by witnesses both those called for the plaintiff and those for defendant, that it was a general custom, not only on this road but other roads, to carry such a pail attached to some one of the cars in a long train in order to facilitate the treatment of hot boxes.

Upon this evidence, which is without dispute, we deem it entirely clear that the carriage of such pail under the circumstances cannot of itself constitute negligence. Negligence is a failure of the care ordinarily exercised by the great mass of persons under like circumstances. It was proved without contradiction that the managers and employees of railroads ordinarily carry a bucket as this was carried. How then could it be said that what was the custom of the mass of mankind was so variant from that custom as to constitute negligence? It has been held in a long array of cases that proof that the conduct of a defendant coincided with the customary method of doing the business by others under similar circumstances excludes the inference of negligence. *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563; *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689. Such condition was fully established in this case. True, an exception is noted in the authorities, and equally well established, to the effect that a custom which is so obviously dangerous to life and limb as to be at once recognized as such by all intelligent persons cannot be justified under this rule. *Boyce v. Wilbur L. Co.* 119 Wis. 642, 648, 97 N. W. 563; *Yazdzewski v. Barker,* 131 Wis. 494, 498, 111 N. W. 689. But the manner of carrying the bucket in question clearly is open

to no such criticism. From the measurements of cars as above stated it is obvious that the bucket did not project laterally beyond the rails further than do some of the cars which were usually if not universally present in freight trains. It therefore offered no danger to any person far enough from the track to clear the cars ordinarily carried therein. It would be no more menacing to one alongside the train than other objects customarily in that train. Hence any injury from that fact was no more to be foreseen than from the cars themselves.

For the reason stated the trial court erred in refusing to grant the requests to reverse the answers to the two questions mentioned.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of defendant.

STATE EX REL. GOTTSCHALK, Appellant, vs. MILLER, Town Clerk, Respondent.

September 10—September 29, 1908.

Certiorari: *Appeal: Review of judgment: Highways: Laying out and discontinuing: Clerical error in description: Presumption of regularity: Notice to landowners.*

1. Where, upon appeal from a judgment quashing a writ of *certiorari*, the record shows that the circuit court heard the cause upon its merits on the return to the writ, and that there was no motion to quash, this court will review the judgment.
2. In the proceedings of a town board laying out a highway, designation of the point of beginning as eighteen rods west of the *northeast* corner of a certain quarter-section, instead of the *southeast* corner thereof, is *held* to be a mere clerical error not invalidating the order of the board, where other parts of the description definitely showed the true point of beginning.
3. Under sec. 1298, Stats. (1898), an order laying out or discontinuing a highway is conclusive evidence, in the absence of an affirmative showing to the contrary, of the facts stated therein and of the regularity of the prior proceedings, including the sufficiency of a notice and its service upon the proper persons.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The appeal is from a judgment quashing a writ of *certiorari* and affirming the order of the supervisors of the town of Eagle, Richland county, in laying out a highway and in discontinuing part of an old one. Application was made to the supervisors requesting them to lay out a highway described as follows:

"Commencing in the highway in said town known as the Mark Lewis highway, about eighteen (18) rods west of the northeast corner of the northeast quarter of the southeast quarter of section number 1 of said town; thence running west on the south line of said forty about twenty-six rods; thence north to the old house of Lewis Bethke, being about sixty rods; thence in a northwest direction until it strikes the old highway about eight rods east of the northwest corner of the northeast quarter of the southeast quarter of section number 1."

The application also requested the discontinuance of a highway described as follows:

"Commencing at the terminus of the proposed highway about eight rods east of the northwest corner of the northeast quarter of the southeast quarter of said section one (1), and where said old highway strikes the north line of the northeast quarter of the southwest quarter of section number 12 of said town."

Thereafter the supervisors fixed a time and place at which they would meet and decide upon the application. The notice fixing the time and place for the meeting contained the description as given above. The supervisors met pursuant to the notice and adjourned the meeting, and met at the time and place of adjournment. At the adjourned meeting they made an order laying out the proposed road and discontinuing the portion of the old road in form as follows:

"We, the undersigned, supervisors of said town, did on the 16th day of October, 1907, make out a notice and fix therein a time and place at which we would meet and decide

upon such application, and did meet on the 30th day of October, 1907, at 10 o'clock in the forenoon of said day, at the house of Mark Lewis, in said town, it being the time and place fixed by us in said notice; and first having been satisfied by due proof that the notice aforesaid had been duly given five days previous to the time of our said meeting to all the occupants of the lands through which such highway may pass, by serving each of them personally with such notice or by copy thereof left with or at the usual place of abode of each occupant of said lands, and had also been posted up in three public places in said town ten days before the time of our said meeting in the manner required by law, we did then and there proceed to examine personally said highway, and did hear any and all reasons that were offered for and against laying out said highway and discontinuing such highway; and the said meeting having been duly adjourned by us to the 9th day of November, 1907, at 10 o'clock in the forenoon, at the house of Emery Miller, in said town, of the time and place of which adjournment, when made, public notice was duly given by us, and notice thereof was forthwith filed in the office of the town clerk of said town, the undersigned did again meet at the adjourned time and place aforesaid, and having further examined into the premises and heard any further reasons that were offered for or against said application, and it being our opinion that the public good will thereby be promoted, did decide to lay out such highway and discontinue such highway as hereafter described.

"Now, therefore, pursuant to said application, we, the said supervisors, do hereby order and determine that a highway be and the same is hereby laid out in said town as follows."

The description then given is the same as given heretofore. A like order was made discontinuing the part of the old highway, the description being the same as that previously given herein. The board awarded damages to the persons whose lands are alleged in the petition to be affected by the laying out and the discontinuance of these highways.

Relator on December 4, 1907, appealed from the order. The county judge issued a notice specifying December 12,

1907, as the time, and the office of the county judge as the place, for the appointment of commissioners. At the time and place appointed the county judge was not present. A writ of *certiorari* was issued by the circuit court upon relator's petition, setting forth the above facts and alleging as errors the misdescription, that the highway did not begin at or intersect any highway, that the proper notice was not given of the meeting, that no proof of any notice having been served upon the occupants of lands through which the road ran was on file in the office of the town clerk, that no notice was served upon the petitioner or upon the occupants of the land which touched upon or abutted on the discontinued highway, that the petitioner was not allowed damages nor were damages allowed to the occupants of the lands touching upon the discontinued highway, and that the discontinuance of the highway deprived petitioner of access to a public highway from his lands.

The case was tried by the court upon its merits, and the court found that the proceedings of the board were in substantial compliance with the statute; that the error in describing the commencement of the new highway as eighteen rods west of the northeast corner of the quarter-section instead of the southeast corner of the quarter-section was a clerical mistake that did not vitiate the proceedings; that the order was presumptive evidence of the regularity of the prior proceedings; and that the proceedings of the supervisors in laying out the highway and in discontinuing the old one should be affirmed. This is an appeal from the judgment in accordance with the findings of the court.

The cause was submitted for the appellant on the brief of *A. C. Vaughan,* and for the respondent on that of *F. W. Burnham* and *P. L. Lincoln.*

SIEBECKER, J. The record shows that the court heard the cause upon its merits on the return to the writ. No motion

to quash having been heard and determined by the court and the case having been decided on the merits, this court will review the judgment in the case. *State ex rel. Dalrymple v. Milwaukee Co.* 58 Wis. 4, 16 N. W. 21; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex rel. Cameron v. Roberts,* 87 Wis. 292, 58 N. W. 409; *State ex rel. Barteau v. Circuit Court,* 101 Wis. 422, 77 N. W. 745.

The proceedings of the town board are assailed upon the ground that the description of the proposed highway is fatally defective, in that it designates the point of beginning as "about eighteen (18) rods west of the *northeast* corner of" a quarter-section instead of the *southeast* corner thereof. This error is undisputed. It is manifest that the *southeast* corner is the correct one. This clearly appears from what precedes, where this point is located as in the Mark Lewis highway, which crosses the south line of this quarter-section about eighteen rods west of the southeast corner. The order also proceeds to locate the highway as "thence running west on the south line of said forty." From these data the point of commencement is definitely shown, and the alleged misdescription becomes a mere clerical error and does not affect the validity of the order.

The other alleged defects in the proceedings by the board are that the notice of hearing the petition and its service are insufficient and defective, that the highway laid out does not intersect with another, and that there was no proper award of damages to relator and others occupying lands abutting on the discontinued highway. These irregularities cannot be held to exist in the proceedings had, in view of the record made by the town board in laying out and discontinuing the highways. So far as the record shows, the lands affected by the proposed and discontinued highways are alleged to be owned by Lewis Bethke and Mark Lewis and their damages are shown to have been settled and awarded as required by statute. There is nothing in the record to show that other

parties sustained damages by the laying out of the new road or the discontinuance of part of the old one.

It is averred that no public notice was given, and that there is no proof that a notice was served on owners of lands through which the new highway passes or on those whose lands abut on the discontinued highway. Sec. 1298, Stats. (1898), provides that the order laying out or discontinuing highways "shall be presumptive evidence of the facts therein stated and of the regularity of all the proceedings prior to the making of such order." Under this statute we are concluded by the order laying out and discontinuing the highways in question as to the facts therein stated and as to the regularity of every step taken prior to the making of the order, and this includes the sufficiency of a notice and its service on the proper persons. In *Williams v. Mitchell,* 49 Wis. 284, 5 N. W. 798, it was held, respecting the effect of such an order:

"It is *prima facie* evidence that the notice was served on all owners of lands through which the altered highway was laid. It is not sufficient that the record fails to show such service affirmatively. To impeach the validity of the proceeding the failure of service must appear affirmatively. We find in the record no proof of such failure." *State ex rel. Jenkins v. Harland,* 74 Wis. 11, 41 N. W. 1060.

There is nothing before us to show affirmatively that a proper notice was not served on the interested parties.

Our conclusion is that the court properly held that the proceedings of the board were valid.

By the Court.—Judgment affirmed.

MINNEAPOLIS THRESHING MACHINE COMPANY, Appellant, vs. HAUG and another, Respondents.

September 10—September 29, 1908.

Statutes: Construction: Chattel mortgages: Foreclosure sales: "Actually taken."

1. Penal statutes are to be strictly construed.
2. In construing a statute the mischief intended to be prevented may be considered.
3. In sec. 2316*a*, Stats. (1898),—providing under penalty that no property taken by virtue of any chattel mortgage shall be sold or removed from the county, without consent of the mortgagor, within five days "from the time when the same was actually taken,"—the actual taking mentioned means a corporal taking out of the possession and control of the mortgagor; and a foreclosure sale, on notice, without any taking of the property is not a violation of the statute.

APPEAL from a judgment of the circuit court for Trempealeau county: J. J. FRUIT, Circuit Judge. *Reversed.*

This action was brought to recover balance due on promissory notes. The case was tried upon the following stipulated facts:

"That the plaintiff is entitled to judgment as prayed for in the complaint, unless the plaintiff has violated sec. 2316*a* of the Statutes of 1898, and the acts amendatory thereof, by making a sale of the property mentioned and described in the answer herein, without the consent of the mortgagor, before the expiration of five days from the time when the said property was actually taken; and in case plaintiff did violate the provisions of said sec. 2316*a* the defendants are entitled to judgment as prayed for in their answer. That said plaintiff, under and by virtue of the provisions of a certain chattel mortgage, duly executed by said defendants to said plaintiff and filed as required by law, by its duly authorized agent, did on the 11th day of April, A. D. 1906, make out a sufficient notice of foreclosure sale of the property described in defendants' answer, which said notice was by said agent, on the 11th day of April, A. D. 1906, read to *Olaf*

Haug, one of the above named defendants, at his home in the town of Unity, in the county of Trempealeau, and state of Wisconsin. At the same time plaintiff's agent read said notice he served upon defendant *Olaf Haug* the summons in this action. That the said property described in said mortgage and notice was then and there located upon the farm occupied by said *Olaf Haug,* at a point about thirty rods west of the dwelling house, and in view of the said parties during the reading of said notice, and in the possession of said defendant, and were upon wheels and in substantially the same shape as when moved upon said premises. That the copies of the notice of foreclosure sale and affidavit hereunto annexed are true and correct copies of said notice of foreclosure sale and affidavit made and filed in the office of the town clerk of Unity. That the roads in the vicinity of the farm of said *Olaf Haug* were in a bad and extremely muddy condition on the said 11th day of April, A. D. 1906, and that the said plaintiff by its agent posted in three public places in said town of Unity, wherein said property was located, notices of said foreclosure sale, which notices so posted were true and like copies of the aforesaid notice of foreclosure sale. That pursuant to said notice the plaintiff, by its authorized agent, did on the 24th day of April, A. D. 1906, at the farm of said *Olaf Haug,* in said town of Unity, being the place and time specified in said notice, sell and dispose of said property described in said notice and mortgage at public auction. That said property was then and there on said premises in the same place and in the same condition as at the time of the reading and posting of said notices. And that the said property was then and there struck off and sold to the said plaintiff at the price of eight hundred dollars ($800), the said plaintiff being the highest bidder, and that being the highest bid thereof. That the said *Olaf Haug,* one of the defendants, at the time of the making of said sale, objected to the said sale being made for the reason that the said plaintiff had not taken and removed the property previous to said sale. That the said plaintiff, by its agent, who made said sale, did make and file with the town clerk of said town of Unity, where the mortgage was on file, the affidavit and copy of notices required by ch. 122 of the Laws of 1903."

On these facts the court found the chattel mortgage covered the property in question and that such property was never actually taken previous to the day of sale, and found as conclusions of law that by force of the sale before the expiration of five days from the time the property was actually taken the notes secured by the mortgage were paid and became void and of no force and effect and the chattel mortgage became canceled, and that the defendants recover $25 liquidated damages. Judgment was entered in accordance with the findings of fact and conclusions of law, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Anderson & Ekern,* and for the respondent on that of *G. O. Linderman.*

KERWIN, J. The only question involved in this case is whether the appellant violated sec. 2316*a,* Stats. (1898), which reads:

"No sale of any personal property taken by virtue of any chattel mortgage, . . . except by consent of the mortgagor, his legal representatives or assigns, shall be made before the expiration of five days from the time when the same was actually taken, nor shall any such property during such time be removed from the county where it was situated when taken; and during such period such property shall be subject to redemption by payment of the mortgage debt and the actual and necessary costs and expenses of taking and keeping it incurred at the time of making redemption. Any person aggrieved by a violation of any provision of this section may recover of the person who violated the same, in addition to his actual damages, twenty-five dollars as liquidated damages. If any such property is sold at private sale, without public notice, or is sold within the period herein limited, without such consent, the mortgage debt shall be deemed paid and the mortgage securing the same be deemed canceled. . . ."

This is a highly penal statute and must be strictly construed. *Hammel v. Cairnes,* 129 Wis. 125, 107 N. W.

1089; *Cohn v. Neeves,* 40 Wis. 393; *Wright v. E. E. Bolles W. W. Co.* 50 Wis. 167, 6 N. W. 508; *Schumacher v. Falter,* 113 Wis. 563, 89 N. W. 485; *Johnson v. Huber,* 117 Wis. 58, 93 N. W. 826.

The mischief intended to be prevented by the statute may be considered in construing it. *Cohn v. Neeves, supra.* This was to prevent mortgagees from seizing chattel-mortgage property and removing it from the county where situate, or taking it out of the possession of the mortgagor and immediately selling it without notice to him. We think the actual taking mentioned in the statute means a corporal taking out of the possession and control of the mortgagor. In order to incur the penalty prescribed by this statute it was necessary that the property covered by the chattel mortgage be taken and sold by plaintiff within five days from the time the same was actually taken. There is nothing in the record showing such taking, or any taking, within the meaning of the statute; hence no violation of the statute was shown and no defense was made out, and the plaintiff was entitled to judgment for the amount due on the notes.

By the Court.—The judgment of the court below is reversed, and the action remanded with directions to the court below to render judgment for plaintiff on the notes sued upon.

RICHER, Respondent, vs. CARLSON, Appellant.

September 10—September 29, 1908.

(1) Justices' courts: Actions involving title to land. (2) Judgment: Recovery of money paid on void contract.

1. Secs. 3619–3621, Stats. (1898), prescribing proceedings to be taken in an action in justice's court "where the title to lands shall in any wise come in question," are not limited to cases where the title to land is directly in issue. They apply to an

action to recover a share of the proceeds of a sale of land by defendant to a third person, where plaintiff claims that the sale was made under authority from him and on his account or on joint account, and defendant denies that plaintiff owns the land and claims that it belonged to himself and that the sale was made on his own account.

2. In an action to recover a share of the proceeds of a sale of land by defendant to a third person, on the ground that defendant had held the title as security for purchase money advanced by him for the use of plaintiff, it being found that defendant acquired the title to himself but orally agreed to sell to plaintiff, that plaintiff went into possession and made several payments, and that after the sale to the third person defendant repudiated such oral contract, it was not error to give judgment for plaintiff for the amount of the payments made by him under the oral agreement.

APPEAL from a judgment of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Veeder & Veeder,* and for the respondent on that of *J. T. Dithmar.*

Among other references upon the part of the appellant were the following: Secs. 3619, 3620, 3621, Stats. (1898); *Bird v. Kleiner,* 41 Wis. 134; *Ohse v. Bruss,* 45 Wis. 442; *Miles v. Chamberlain,* 17 Wis. 446; *Verbeck v. Verbeck,* 6 Wis. 159; secs. 2302, 2304, Stats. (1898); *Yates v. Martin,* 2 Pin. 171; *Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005; *Potter v. Necedah L. Co.* 105 Wis. 25, 80 N. W. 88, 81 N. W. 118; *Jackson v. Jacksonport,* 56 Wis. 310, 14 N. W. 296; *U. S. Exp. Co. v. Jenkins,* 64 Wis. 542, 25 N. W. 549.

Among other references upon the part of the respondent were the following: *Ames v. Meehan,* 63 Wis. 408, 23 N. W. 586; *Maxim v. Wedge,* 69 Wis. 547, 35 N. W. 11; Bryant, Wis. Justice (7th ed.) 41, 43, 46; *Starks v. Redfield,* 52 Wis. 349, 9 N. W. 168; *Cumps v. Kiyo,* 104 Wis. 656, 80 N. W. 937; *Beebe v. Wis. M. L. Co.* 117 Wis. 328, 93 N. W.

1103; *Barchent v. Snyder,* 128 Wis. 423, 107 N. W. 329; sec. 1688, Stats. (1898).

TIMLIN, J. Respondent brought an action in justice's court, averring in his complaint: "above-named plaintiff became the owner of and went into possession" of a certain piece of land, describing it. Defendant by his answer in justice's court "denies that said plaintiff became or was the owner of the real estate in said complaint mentioned," and gave a bond under sec. 3620, Stats. (1898), and the cause was removed to the circuit court under sec. 3621. Appellant now contends that the title to the land was not in any wise in question, notwithstanding the foregoing, because the averment of the complaint above quoted is followed by allegations showing the cause of action counted upon to be for the plaintiff's share of the proceeds of the sale of this land by defendant to a third person under power or authority from plaintiff, and that defendant denies that the land belonged to the plaintiff, but admits the sale to a third person. He concludes, therefore, "we both agree the title is in another."

We think this is one of the very cases provided for by the statute in question, and that upon the claim of the plaintiff and the denial of the defendant, both parties admitting the sale of the land by the defendant, but plaintiff claiming the sale was made on his account or upon joint account, and the defendant claiming the land belonged to and the sale was made by him for his own account, the title to the land was in question under this statute. We cannot limit this statute to cases where the title to land is directly in issue without doing violence to the words of the statute, which apply to all actions in which the title to lands "shall in any wise come in question."

The plaintiff attempted to establish that the defendant was a mortgagee or trustee for the plaintiff, holding the legal title by absolute deed from a third party, but as security for

part purchase money advanced by defendant for the use of and at the request of plaintiff. The court below rejected this claim and took the view that the defendant acquired title from the third party to himself, but orally agreed to sell the land to the plaintiff, and that plaintiff went into possession and made several payments, and that after the sale by the defendant to a third party he repudiated this oral contract to convey to the plaintiff; consequently the plaintiff might recover from the defendant all payments made for the land to the defendant, or to the use of the defendant at defendant's instance or request, under this contract void by the statute of frauds. We find no error in this disposition of the case and affirm the judgment.

By the Court.—Judgment affirmed.

COOLIDGE, Respondent, vs. LA CROSSE CITY RAILWAY COMPANY, Appellant.

September 10—September 29, 1908.

Street railways: Injury to passenger: Negligent handling of trolley rope: Custom.

While on the rear platform of one of defendant's street cars and about to descend the steps, plaintiff was struck in the eye by the end of the rope attached to the trolley pole, which the conductor had thrown with one hand from the center window of the vestibule around to the side entrance thereof, intending to catch it with his other hand as it swung around. *Held* that, notwithstanding any practice or custom in vogue among defendant's employees, the jury were warranted in finding that there was a negligent handling of the rope, that the plaintiff's injury was the natural and probable consequence of the negligent act, and that a person of ordinary care ought to have foreseen that some injury would be likely to result therefrom.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This action is brought to recover damages for the loss of an eye, alleged to have been caused by the actionable negligence of defendant, which operates a street railway in the city of La Crosse. The plaintiff was a passenger on one of the defendant's cars and desired to leave the same at the end of its journey. While plaintiff was on the rear platform and about to descend from the car he was struck in the eye by the end of the trolley rope, and it is claimed that the blow thus received resulted in the loss of his right eye. It appeared that the car in question was of the ordinary kind with a vestibuled platform at each end. On arriving at the end of its route the direction of the car was reversed by releasing the trolley from the wire and swinging it around and bringing it in contact again with the wire above the other end of the car. This was done by means of a rope, one end of which was fastened to the trolley pole. There was a loop bound with wire on the other end, which was passed through the window in the center of the vestibule and hung on a hook on the inside. In swinging the trolley it appeared that the defendant's employees sometimes disengaged the rope from the hook and dropped it through the vestibule window, so that they were obliged to leave the car in order to get hold of it to swing the pole. It also appeared that conductors were in the habit of catching the rope some distance from the loop, extending one hand through the window of the vestibule, swinging the rope around the side of the vestibule, and catching it with the disengaged hand. It seems to be conceded that the distance that the rope would have to pass was so great that the conductor could not reach through the center vestibule window and pass the rope around so as to catch the other end without swinging or throwing it. At the time in question the conductor attempted to pass the looped end of the trolley pole rope through the window in the center of the vestibule around to the side entrance by swinging or throwing the rope with one hand and catching the looped end

with the other. As plaintiff was on the platform of the vestibule and about to descend from the car the looped end of the rope, thrown by the conductor, struck him in the eye. The eye became swollen and inflamed and plaintiff has lost the use of the same. About two years prior to this time plaintiff lost his other eye through an accident and he is now totally blind.

The jury found: (1) That the defendant was guilty of negligence which caused the injury to and loss of the sight of the plaintiff's right eye. (2) That the injury to the plaintiff was the natural and probable consequence of defendant's negligence. (3) That in the light of attending circumstances a person of ordinary care ought to have foreseen that some injury would be likely to result from such negligence. (4) That the injury to the plaintiff was not the result of an accident without negligence of either party. (5) That the plaintiff was entitled to recover damages to the amount of $10,000. Judgment was rendered on this verdict for the plaintiff. From such judgment defendant brings this appeal.

For the appellant there was a brief by *Woodward & Lees,* and oral argument by *G. M. Woodward.*

For the respondent there was a brief by *Higbee & Higbee,* and oral argument by *E. C. Higbee.*

BARNES, J. Defendant assigns as error: (1) Failure of the court to direct a verdict in its favor; (2, 3, 4) refusal to change the answers to the first, second, and third questions in the special verdict from "Yes" to "No," and (5) refusal to enter judgment for defendant on the verdict as so amended. Substantially the same reasons are urged in support of defendant's motion for a directed verdict as are urged for modifying the special verdict so as to entitle the defendant to judgment thereon.

The defendant's contentions are: (1) The trolley rope was

not handled in a negligent manner. (2) The injury was not the natural and probable consequence of the act. (3) A person exercising ordinary care ought not to have foreseen that some injury would be likely to result from defendant's alleged negligent act, considered in the light of attending circumstances.

The jury found all these disputed questions of fact in favor of the plaintiff, and we think it was fairly within its province, on the evidence before it, so to do. The rope in question was about one quarter of an inch in diameter, or perhaps more. There was a loop on the end of it fastened by wire. To "swing," "pass," or "toss" this rope (using the words of the conductor in describing what he did) in such a manner that the looped end of it was liable to come in contact with passengers' eyes as they were leaving cars seems to us to clearly warrant the jury in finding that there was a negligent handling of the rope, notwithstanding any practice or custom that was in vogue. If the employees of the defendant chose to take this method instead of the safe one of dropping the rope out of the vestibule window and then walking around the end of the car and securing it, it should not have been practiced while passengers were alighting from cars. It is true that the blow, if such it might be called, was not attended with any great degree of violence. It is none the less true that the eye is an extremely sensitive organ and that a comparatively slight blow upon the eyeball may produce serious consequences, and it would be rather hard to escape the conclusion that the swinging of the rope in such a manner that the looped end of it might well come in contact with the eyes of passengers was a negligent act on the part of the conductor.

So, too, we think it was for the jury to say, upon the testimony offered, whether or not the injury was the natural and probable consequence of the defendant's negligence. The evidence is ample to warrant the conclusion of the jury.

The same may be said of the finding of the jury to the effect that, in the light of attending circumstances, a person of ordinary care should have foreseen that some injury would be likely to result from defendant's negligent act. The case before us is very similar to that of *McQuade v. The Golden Rule* (Minn.) 117 N. W. 484, in which a judgment for the plaintiff was sustained. There is no error in the record.

By the Court.—Judgment affirmed.

LANHAM, Respondent, vs. LANHAM and others, Appellants.

September 10—September 29, 1908.

Marriage: Divorce: Statute prohibiting remarriage within year: Construction and effect: Evasion by marriage in another state: Validity: Common-law marriage.

1. A state has power to declare that marriages between its own citizens contrary to its established policy shall have no validity in its courts, even though they be celebrated in other states under whose laws they would ordinarily be valid; but the legislative intention that a statute should have such effect should be quite clear.
2. Sec. 2330, Stats. (Supp. 1906; Laws of 1905, ch. 456)—providing that it shall be unlawful for any person divorced by any court of this state to marry again within one year, and that any such marriage shall be null and void—is a declaration of public policy and is clearly intended to control the conduct of residents of this state whether they be within or outside its boundaries.
3. When persons domiciled in this state and subject to the provisions of said statute leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provisions of the statute and will not be recognized by the courts of this state.

[4. Whether a judgment of divorce under the laws of this state should not be construed as containing an inhibition of marriage of either party within one year which must be given "full faith and credit" (under sec. 1, art. IV, Const. U. S.) in all other

states, so that such a marriage is not valid anywhere, is not decided.]

5. For the purpose of evading the statute above mentioned a divorced woman was married in Michigan to another resident of this state. They returned here and cohabited as husband and wife until the husband's death some months after the expiration of a year from the divorce. They had talked about a remarriage after the year, but it never took place on account of the husband's illness and death. *Held*, that there was no common-law marriage.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Reversed.*

The plaintiff applied to the county court of Monroe county for an allowance for her support out of the estate of James W. Lanham, deceased, claiming that she was the widow of said deceased. The application was contested and denied in the county court, but on appeal that judgment was reversed and an allowance granted, and from this judgment the heirs of Lanham appeal.

The facts are few and simple. On and prior to the 15th day of September, 1905, the plaintiff was a resident of this state and was the wife of one J. R. Sherman. On the day named she obtained a judgment of divorce from Mr. Sherman for the purpose of marrying the deceased, who was then a resident of Wisconsin and a man eighty-four years of age. After the divorce both parties learned that the law of Wisconsin prohibited the plaintiff from marrying again until the expiration of one year from the divorce. For the purpose of avoiding the effect of the law they went to Menominee, Michigan, October 10, 1905, and were there married by a justice of the peace, and returned to Wisconsin on the following day. They immediately assumed the relations of husband and wife and lived and cohabited together in Monroe county until Lanham's death March 13, 1907. On March 8, 1907, the plaintiff made application to the county judge of Monroe county for a permit to marry Lanham,

but he was then very ill and no ceremony was ever performed.

The circuit court concluded that there was a valid common-law marriage between the parties, resulting from their living and cohabiting together as man and wife after the expiration of one year from the date of the decree of divorce, and held that the plaintiff was the lawful widow of the deceased and entitled to an allowance as such.

For the appellants there was a brief by *Higbee & Higbee,* and oral argument by *E. C. Higbee.* They argued, among other things, that the marriage was not valid in this state. *Sturgis v. Sturgis* (Oreg.) 93 Pac. 696; *Estate of Stull,* 183 Pa. St. 625, 39 L. R. A. 542; *Pennegar v. State,* 87 Tenn. 244, 2 L. R. A. 703; *Sussex Peerage Case,* 11 Cl. & F. 85; *Williams v Oates,* 27 N. C. (5 Ired. Law) 535; *State v. Tutty,* 41 Fed. 753; *Conn v. Conn,* 2 Kan. App. 419, 42 Pac. 1006; *McLennan v. McLennan,* 31 Oreg. 480, 50 Pac. 802, 38 L. R. A. 863; *Kruger v. Kruger* (Ill. Super. Ct.) 36 Nat. Corp. Rep. 442; *Williams v. Williams,* 63 Wis. 58; *Zahorka v. Geith,* 129 Wis. 498, 505; Story, Confl. Laws, secs. 86, 87; Wharton, Confl. Laws, secs. 159–165*b*. There was an entire absence of proof as to the law of Michigan, and in such case a court of this state must presume the law there to be the same as here. *Rape v. Heaton,* 9 Wis. 329; *MacCarthy v. Whitcomb,* 110 Wis. 113; *Hyde v. German Nat. Bank,* 115 Wis. 170; *Hynes v. McDermott,* 82 N. Y. 41; *Bailey v. State,* 36 Neb. 808, 55 N. W. 241; *People v. Loomis,* 106 Mich. 250, 64 N. W. 18; *Comm. v. Graham,* 157 Mass. 73, 16 L. R. A. 578; *Jackson v. Jackson,* 82 Md. 17, 34 L. R. A. 776; *Comm. v. Stevens,* 196 Mass. 280, 82 N. E. 33. The relationship between these parties having been illegal in its inception, it must be held to have been continued, unless there is affirmative proof of subsequent marriage. *Drawdy v. Hesters,* 130 Ga. 161, 60 S. E. 451; *Comm. v. Stevens,* 196 Mass. 280, 82 N. E. 33; *Thompson v. Thompson,* 114 Mass. 566.

For the respondent there was a brief by *Masters, Graves & Masters,* and oral argument by *R. B. Graves.* They contended, *inter alia,* that when a marriage is established by evidence or admissions it is presumed to be valid, and the burden of establishing the contrary fact rests on the party who attacks it. 26 Cyc. 877. In case of conflicting presumptions in civil cases, the presumption in favor of marriage generally prevails over all others. 3 Elliott, Ev. § 2486; *Johnson v. Johnson,* 114 Ill. 611, 55 Am. Rep. 883, 2 N. E. 232. The burden of proving restrictions in another state upon the remarriage of divorced persons is upon the person alleging them. *State v. Shattuck,* 69 Vt. 403, 40 L. R. A. 428; *Hutchins v. Kimmell,* 31 Mich. 126, 18 Am. Rep. 164; *Ward v. Morrison,* 25 Vt. 593, 601. The weight of authority holds that if a marriage between divorced persons is valid according to the *lex loci,* it will be upheld by the courts of the state which enacted the statute prohibiting it and in which the parties to the marriage are domiciled, notwithstanding that the parties went out of the state to solemnize the same for the express purpose of evading the law of the domicile and of the forum. *Hills v. State,* 61 Neb. 589, 57 L. R. A. 155, and note; *Comm. v. Lane,* 113 Mass. 458; *Medway v. Needham,* 16 Mass. 157; *Ross v. Ross,* 129 Mass. 243; *Van Voorhis v. Brintnall,* 86 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp,* 90 N. Y. 602, 43 Am. Rep. 189; *Moore v. Hegeman,* 92 N. Y. 521, 44 Am. Rep. 408; *State v. Shattuck,* 69 Vt. 403, 40 L. R. A. 428; *State v. Richardson,* 72 Vt. 49, 47 Atl. 103; *Phillips v. Madrid,* 83 Me. 205, 12 L. R. A. 862; *Fuller's Adm'r v. Fuller,* 40 Ala. 301; *State v. Bentley,* 75 Vt. 163, 53 Atl. 1068; *Sutton v. Warren,* 10 Met. 451; *Putnam v. Putnam,* 8 Pick. 433; *State v. Weatherby,* 43 Me. 258, 69 Am. Dec. 56; *Comm. v. Hunt,* 4 Cush. 49; *Stack v. Stack,* 6 Dem. Sur. (N. Y.) 280; *In re Chace,* 26 R. I. 351, 69 L. R. A. 493. The principal cases holding contrary views are *Williams v. Oates,* 27 N. C. (5 Ired. Law) 535; *Estate of*

Stull, 183 Pa. St. 625, 39 L. R. A. 539; *Pennegar v. State,* 87 Tenn. 244, 2 L. R. A. 703; *Kinney v. Comm.* 30 Gratt. 858, 32 Am. Rep. 690; *Dupre v. Boulard's Ex'r,* 10 La. Ann. 411; *State v. Kennedy,* 76 N. C. 251, 22 Am. Rep. 683. No more reason exists for giving the statute under consideration extraterritorial force than any other legislative enactment forbidding in unqualified terms the doing of an act, and which must always be understood as forbidding the thing in the state. *Charles v. People,* 1 N. Y. 180; *Sims v. Sims,* 75 N. Y. 466; *Nat. T. Co. v. Gleason,* 77 N. Y. 400; *Van Voorhis v. Brintnall,* 86 N. Y. 18; *Western T. & C. Co. v. Kilderhouse,* 87 N. Y. 430; *Phillips v. Madrid,* 83 Me. 205, 12 L. R. A. 862. In the following cases where the original cohabitation was preceded by a ceremonial marriage which was void because one of the parties was already married, it was held that the continuance of the cohabitation after the removal of the impediment by the death of the former husband or wife, in connection with circumstances tending to show that the parties regarded their relations as of a matrimonial character and held themselves out as husband and wife, created a presumption of marriage, although there was no evidence of another ceremony. *Hyde v. Hyde,* 3 Bradf. Sur. 509; *Donnelly v. Donnelly's Heirs,* 8 B. Mon. 113; *Fenton v. Reed,* 4 Johns. 52, 4 Am. Dec. 244; *Adams v. Adams,* 57 Miss. 267; *Appeal of Reading F. Ins. & T. Co.* 113 Pa. St. 204, 57 Am. Rep. 457–463, note; *Chamberlain v. Chamberlain,* 68 N. J. Eq. 736, 62 Atl. 680; *Schuchart v. Schuchart,* 61 Kan. 597, 50 L. R. A. 180; *Petit v. Petit,* 45 Misc. 155, 91 N. Y. Supp. 979; *Eaton v. Eaton,* 66 Neb. 676, 60 L. R. A. 605; *Manning v. Spurck,* 199 Ill. 447, 65 N. E. 342; *Barker v. Valentine,* 125 Mich. 336, 51 L. R. A. 787; *In re Schmidt,* 42 Misc. 463, 87 N. Y. Supp. 428; 1 Bishop, Mar., Div. & Sep. §§ 970, 975, 979; *Univ. of Mich. v. McGuckin,* 62 Neb. 487, 57 L. R. A. 917; *Teter v. Teter,* 88 Ind. 494; *S. C.* 101 Ind. 129; *Flanagan v. Flanagan,* 122 Mich. 386, 81 N. W. 258.

WINSLOW, C. J. Sec. 2330, Stats. (1898), as amended by ch. 456, Laws of 1905, provides, among other things, that "it shall not be lawful for any person divorced from the bonds of matrimony by any court of this state to marry again within one year from the date of the entry of such judgment or decree and the marriage of any divorced person solemnized within one year from the date of the entry of any such judgment or decree of divorce shall be null and void." A proviso to the section authorizes the circuit judge to grant permission to the divorced parties to remarry within the year, but this is of no moment here. The first question is whether the Michigan marriage was valid notwithstanding the provisions of this law.

The general rule of law unquestionably is that a marriage valid where it is celebrated is valid everywhere. To this rule, however, there are two general exceptions which are equally well recognized, namely: (1) Marriages which are deemed contrary to the law of nature as generally recognized by Christian civilized states; and (2) marriages which the lawmaking power of the forum has declared shall not be allowed validity on grounds of public policy. An exhaustive review of the many and somewhat conflicting authorities upon this general subject will be found in a note to *Hills v. State* in 57 L. R. A. at p. 155; *S. C.* 61 Neb. 589, 85 N. W. 836. The first of these exceptions covers polygamous and incestuous marriages and has no application here, and the question presented is whether the case comes within the second exception.

A state undoubtedly has the power to declare what marriages between its own citizens shall not be recognized as valid in its courts, and it also has the power to declare that marriages between its own citizens contrary to its established public policy shall have no validity in its courts, even though they be celebrated in other states under whose laws they would ordinarily be valid. In this sense, at least, it has

power to give extraterritorial effect to its laws. The intention to give such effect must, however, be quite clear. So the question must be, in the present case, whether our legislature by the act quoted declared a public policy and clearly indicated the intention that the law was to apply to its citizens wherever they may be at the time of their marriage. To our minds there can be no doubt that the law was intended to express a public policy. There have been many laws in other states providing that the guilty party in a divorce action shall not remarry for a term of years, or for life, and these laws have generally been regarded merely as intended to regulate the conduct of the divorced party within the state and not as intended to follow him to another jurisdiction and prevent a marriage which would be lawful there; in other words, they impose a penalty local only in its effect. Under this construction the remarriage of such guilty party in another state has generally been held valid notwithstanding the prohibition of the local statute. Of this class are the cases of *Frame v. Thormann,* 102 Wis. 653, 79 N. W. 39; *Van Voorhis v. Brintnall,* 86 N. Y. 18; and *State v. Shattuck,* 69 Vt. 403, 38 Atl. 81, and others which might be cited.

It is very clear, however, that the statute under consideration is in no sense a penal law. It imposes a restriction upon the remarriage of both parties, whether innocent or guilty. Upon no reasonable ground can this general restriction be explained except upon the ground that the legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages. The inference is unmistakable that the legislature recognized the fact that the sacredness of marriage and the stability of the marriage tie lie at the very foundation of Christian civilization and social order; that divorce, while at times necessary, should not be made easy, nor should inducement be held out to procure it; that one of the frequent causes of marital disagreement and divorce actions

is the desire on the part of one of the parties to marry another; that if there be liberty to immediately remarry, an inducement is thus offered to those who have become tired of one union, not only to become faithless to their marriage vows, but to collusively procure the severance of that union under the forms of law for the purpose of experimenting with another partner, and perhaps yet another, thus accomplishing what may be called progressive polygamy; and, finally, that this means destruction of the home and debasement of public morals. In a word, the intent of the law plainly is to remove one of the most frequent inducing causes for the bringing of divorce actions. This means a declaration of public policy or it means nothing. It means that the legislature regarded frequent and easy divorce as against good morals, and that it proposed, not to punish the guilty party, but to remove an inducement to frequent divorce.

To say that the legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that by crossing the state line its citizens could successfully nullify its terms, is to make the act essentially useless and impotent and ascribe practical imbecility to the lawmaking power. A construction which produces such an effect should not be given it unless the terms of the act make it necessary. The prohibitory terms are broad and sweeping. They declare not only that it shall be unlawful for divorced persons to marry again within the year, but that any such marriage shall be *null and void.* There is no limitation as to the place of the pretended marriage in express terms, nor is language used from which such a limitation can naturally be implied. It seems unquestionably intended to control the conduct of the residents of the state whether they be within or outside of its boundaries. Such being, in our opinion, the evident and clearly expressed intent of the legislature, we hold that when persons domiciled in this state and who are subject to the provisions

of the law leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provisions of the law and will not be recognized by the courts of this state. Further than this we are not required to go. This view is sustained by the following cases: *Brook v. Brook,* 9 H. L. Cas. 193; *Sussex Peerage Case,* 11 Cl. & F. 85; *State v. Tutty,* 41 Fed. 753; *Pennegar v. State,* 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703; *McLennan v. McLennan,* 31 Oreg. 480, 50 Pac. 802; *Estate of Stull,* 183 Pa. St. 625, 39 Atl. 16, 39 L. R. A. 542; *Kruger v. Kruger* (Super. Ct. Ill.) 36 Nat. Corp. Rep. 442.

Another view of the question, leading to the same result, has been suggested to our minds, which will be stated. The statute cited is an integral part of the divorce law of this state and in legal effect enters into every judgment of divorce. This being so, must not any judgment of divorce be construed as containing an inhibition upon the parties, rendering them incapable of legal marriage within a year, which must be given "full faith and credit" in all other states, under sec. 1, art. IV, of the constitution of the United States? And if it be entitled to receive such faith and credit, how can a marriage within another state be considered valid anywhere? Are not the parties incapable of contracting such a marriage anywhere, for the reason that they have not yet been relieved of their incapacity to marry another, resulting from their former marriage, or, in other words, for the reason that their divorce is not complete until the expiration of the year? We suggest these questions without definitely expressing an opinion upon them or making them a ground of decision.

The Michigan marriage being held void, the question recurs whether the finding that there was a common-law marriage, resulting from the fact that the parties lived and co-

habited together as man and wife for about six months, can be sustained. This must be answered in the negative. This court has held that, where cohabitation is illegal in its inception, the relation between the parties will not be transformed into marriage by evidence of continued cohabitation, or by any evidence which falls short of establishing either directly or circumstantially the fact of an actual contract of marriage after the bar has been removed. *Williams v. Williams,* 46 Wis. 464, 1 N. W. 98; *Spencer v. Pollock,* 83 Wis. 215, 53 N. W. 490; *Thompson v. Nims,* 83 Wis. 261, 53 N. W. 502. There was no such evidence here. At most the evidence only shows that the parties continued to live together after the expiration of the year in the manner of husband and wife, and talked about a remarriage, which never took place on account of the husband's illness and death. The evidence in fact rebuts any inference of remarriage rather than supports it.

By the Court.—Judgment reversed, and action remanded to the circuit court with directions to affirm the judgment of the county court.

SIEBECKER, J., dissents.

STELTING, Respondent, vs. BANK OF SPARTA, Appellant.

September 10—September 29, 1908.

Vendor and purchaser: Fraud or mistake of vendor's agent: Pointing out wrong land: Rescission.

Where a person employed to procure a purchaser for land points out the wrong land to intending purchasers, whether by fraud or by mistake, and they purchase in the belief that they are getting the land shown, the consideration paid may be recovered, although the vendor did not know, when it was paid, that the agent had shown the wrong land.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action in equity to rescind a contract for the purchase of real estate in McLean county, North Dakota.

Issues were formed covering the matters referred to in the findings which are to the following effect:

April 10, 1906, defendant, through its agent W. G. Bartlett, pointed out and represented to W. H. Stelting, plaintiff's husband and who was acting for her, land in the state of North Dakota as section 11, township 146, range 84 west, as land belonging to defendant which it proposed to sell to plaintiff. Stelting and plaintiff relying thereon made the contract in question with defendant. As part consideration for the purchase plaintiff delivered to defendant a conveyance of a house and lot in Sparta, described in the complaint, of the reasonable value of $3,000, on the faith of such representations. The Dakota land so pointed out was the south one-half of section 2 and the north one-half of section 11, town 146, range 84 west, and was of greater value than section 11. Defendant ratified the acts of its agent by receiving and retaining the benefits of the contract. Immediately upon such contract being made, plaintiff and her husband visited the Dakota land and learned that the same was not section 11 which defendant owned. It did not own the south half of section 2. Immediately after so obtaining knowledge of the facts she notified defendant thereof and demanded a rescission of the contract and return of the consideration paid thereon, and before this action was commenced tendered defendant a full relinquishment of all interest in such contract. Defendant refused to receive such relinquishment or return such consideration. Plaintiff expended $300 by reason of the false representations aforesaid. Defendant paid for taxes and improvements on the lot conveyed to it $94.31.

Upon such facts the court reached the conclusion that plaintiff was entitled to judgment canceling the contract, re-

quiring a reconveyance of the land conveyed to defendant as aforesaid and nullifying the deed and record thereof, and for costs and disbursements of the action, upon condition of plaintiff paying into court for defendant's benefit $94.31. Judgment was rendered accordingly, and the defendant appealed.

For the appellant there was a brief by *Masters, Graves & Masters* and *Howard Teasdale,* and oral argument by *R. B. Graves.*

For the respondent there was a brief by *Higbee & Higbee,* and oral argument by *E. C. Higbee.*

MARSHALL, J. The evidence shows, quite clearly, that appellant employed Bartlett to procure a purchaser for its Dakota land; that pursuant thereto he assumed to point out the land to plaintiff's representative; that relying thereon the contract sought to be annulled was made, and that neither party thereto, at the time thereof, knew but that the right land had been in fact shown to such representative.

Bartlett's employment undoubtedly included authority to do the things ordinarily done in such cases to procure a purchaser for the property (*Arnold v. Nat. Bank,* 126 Wis. 362, 105 N. W. 828), and whether by fraud or mistake he pointed out the wrong land, upon the contract being made on the faith of his act the mistake or fraud became in effect that of the defendant. The law in that regard has been stated over and over again by this court. The rule as phrased in the syllabus to *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800, has been so many times applied as to be regarded as elementary.

"Where the wrong land is pointed out to intending purchasers, whether intentionally or not, by an agent of the vendors, and the purchase is made in the belief that the land purchased was shown, the consideration paid may be recovered, although the vendors did not know, when it was paid, that the wrong land had been shown."

See, also, *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88; *Fintel v. Cook,* 88 Wis. 485, 487, 60 N. W. 788; *Zunker v. Kuehn,* 113 Wis. 421, 88 N. W. 605; *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476.

Aside from the matter of law above referred to, there are presented only questions as to whether the findings are supported by the evidence. The record in that regard has been carefully examined and the conclusion reached that such findings are not contrary to the clear preponderance of the evidence in any material particular. Therefore under the rule governing the subject they cannot be disturbed.

By the Court.—The judgment is affirmed.

REDEPENNING, Respondent, vs. TOWN OF ROCK, Appellant.

September 11—September 29, 1908.

Highways: Defects: Injury to traveler: Notice of injury: Sufficiency: Evidence: Immaterial errors: Cross-examination: Instructions to jury: Special verdict.

1. The notice of an injury caused by a defect in a highway described the place as about sixty rods north of a town line. There was evidence that the distance was about sixty-three rods, and evidence that it was about fifty-five rods. *Held,* that this warranted the jury in finding that the notice was substantially correct in that particular.
2. Description of the insufficiency of the highway as consisting of "a large number of deep rut holes and a large number of roots and stones" was sufficient, where the evidence tended to show that at the place of accident the highway was gullied or washed out across the traveled track and that there was a rut or hole in this gully and a large stone near the edge of the track near the gully.
3. Defects or inaccuracies in a notice of injury do not invalidate it, under sec. 1339, Stats. (Supp. 1906), if there was no intention to mislead and the town authorities were not in fact misled thereby but were actually informed of the place of injury and the nature of the defect complained of.

4. In an action for an injury caused by a defect in a highway the admission, over defendant's objection, of evidence as to other defects and the general bad condition of other parts of the highway was not prejudicial error where such evidence was merely cumulative, several witnesses having already testified fully on that subject without objection from defendant.
5. A supervisor of the defendant town having, in his direct examination, denied that he had any information of the defective condition of the highway, it was proper to require him to state, on cross-examination, whether he had not heard of previous accidents having occurred at the place in question.
6. Evidence that, immediately after the accident to plaintiff, his father and another person pointed out to a supervisor of the town the place of the accident and the insufficiency of the highway, was admissible as showing that the town officers were informed as to such facts and were not misled, as claimed by defendant, by inaccuracies or indefiniteness in the written notice of injury.
7. Although evidence that the road had been graded and repaired at the place of the accident soon after the accident occurred was not proper to prove that it was insufficient at the time of the accident, yet such evidence was admissible to refute defendant's claim that for a considerable time immediately preceding the accident the wet condition of the road had prevented repair thereof, and also to refute the claim that defendant was misled by defects in the notice of injury as to the place of the accident.
8. Testimony of the superintendent of highways, to the effect that he was informed where the stake of plaintiff's woodrack broke and he fell from the wagon, was admissible to rebut the evidence of the other town officers that they were ignorant of the place of injury and were therefore misled by the defective notice, and also as tending to show that the superintendent was in fact informed of the place; and it was not error to refuse to permit him to be asked, on cross-examination, if he had not heard that the stake broke at a place remote from the place where the plaintiff claimed it broke, such inquiry not tending to impeach his testimony on the direct examination.
9. An instruction to the jury to the effect that it was an undisputed fact that the stake on plaintiff's woodrack broke as his wagon struck the hole at the place of the accident is *held* justified by the evidence.
10. Where the questions submitted for special verdict were appropriate and covered the issues, a party cannot complain because they differed in form and phraseology from those requested by him.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

July 30, 1903, plaintiff received personal injuries, alleged to have been caused by a defective highway in the town of *Rock,* Wood county. Plaintiff was engaged in hauling wood over the road. The wagon wheel ran into a rut, or hole and gully, estimated at from one to two feet deep, causing one of the stakes holding the cordwood on the rack to break and the wood to fall. The horses became frightened, unmanageable, and ran. Plaintiff fell off the wagon and under the wheels of the wagon, which broke and crushed his leg and caused serious personal injuries. The notice of injury which was served upon one of the officers of the town contains the following description of the place of injury:

"On the afternoon of the 30th day of July, 1903, I was driving and riding in a two-horse wagon loaded with cordwood drawn by a span of horses at the public highway in said town which runs north between sections 32 and 33, in township twenty-four (24) north, of range two (2) east, about sixty rods north of the north line of the town of Cary, and while passing that part of the said highway, about sixty rods north of the north line of the town of Cary, in the exercise of due care, in the traveled path of said highway, the wheels of my wagon ran into a deep rut or gully."

This notice is alleged to be defective and misleading in that the place of accident, as shown by the evidence in the case, was not the same as that fixed by this notice of injury. There is evidence tending to show that the place of accident was about fifty-five rods from the town line, and some evidence that it was sixty-three rods from the line, instead of the sixty rods stated in the notice. There was evidence in the case tending to show knowledge on the part of the supervisors of the condition of that road, that they were not in fact misled by the alleged insufficiency of the notice of injury, and that the defects in the highway had existed for a sufficiently long time before the accident to enable the town,

in the exercise of reasonable care and diligence, to have removed the defects.

The jury returned a special verdict finding that the injuries were due to the defective and insufficient condition of the highway; that the town had notice thereof a sufficient length of time before the accident to enable it, in the exercise of reasonable care and diligence, to remove it; that the defects were the proximate cause of the injuries; that plaintiff was not guilty of any want of ordinary care proximately contributing to the injuries; and that the officers of the defendant town were not in fact misled by the notice of injury as to the place of accident by any inaccuracy in describing the place of accident and the injury with sufficient particularity. The jury also fixed plaintiff's damages.

Errors are alleged on this appeal as to the reception and rejection of evidence, as to the instructions of the court and the refusal to submit proposed questions in the special verdict, as to the refusal of the court to change certain of the jury's answers in the special verdict, and as to the refusal of the court to set aside the verdict and to grant a new trial. This is an appeal from the judgment on the verdict.

George L. Williams, for the appellant.

For the respondent there was a brief by *B. R. Goggins* and *D. D. Conway,* and oral argument by *Mr. Conway.*

SIEBECKER, J. The appellant alleges numerous errors. We however deem it sufficient for the disposition of this case on appeal to treat only those which were discussed in argument.

It is urged that the notice of the injury is defective in that it fails to describe the place of injury and the nature of the defect in the highway with sufficient particularity. The place is located as about sixty rods north from the north line of the town of Cary. The evidence varies somewhat as to the exact distance of the place of accident from this town

line. There is evidence that the distance is about sixty-three rods, and some that it is about fifty-five rods. The point located by the notice is between these extremes. This would warrant the jury in concluding that the notice gave the distance as substantially correct.

It is also asserted that the insufficiency is so indefinitely described that the town officers could not ascertain therefrom what defect plaintiff relied on as having caused the injury. The insufficiency is described as consisting of "a large number of deep rut holes and a large number of roots and stones." There is evidence tending to show that the highway at the place of accident was gullied or washed out across the traveled track, that there was a rut or hole in this "gully," and that there was a large stone near the edge of the traveled track, near this gully and the rut or hole. These conditions are of the kind described in the notice, and described the nature of the insufficiency complained of with sufficient particularity. But if the notice were actually defective as alleged by appellant, yet no cause for complaint exists upon this ground, because the jury found that the officers of the town were not in fact misled by any inaccuracy in this notice. The evidence is sufficient to warrant the jury's conclusion that the officers were actually informed of the place of injury and the nature of the defect complained of immediately after the accident happened, and that they were not actually misled in these respects. This, under the statute, relieves plaintiff from the consequence of any insufficiency in the notice in the respects claimed, if the plaintiff did not thereby intend to mislead the town. An examination of the facts and circumstances disclosed clearly shows that plaintiff had no intention to mislead the town in the giving of the notice. It is apparent that his disability from the accident prevented him from personally inspecting the place of the accident, and that those who represented him did on the day of the accident correctly point out and locate the place and insuffi-

ciency to a supervisor of the town, and that the plaintiff did nothing indicating an intent to mislead the town officers in these matters.

It is contended that the evidence of other defects and the general bad condition of other parts of the highway was received over defendant's objection, and that this operated to the prejudice of the defendant. We find that the witness E. C. Redepenning and others were permitted to testify to other insufficiencies in this highway at points some rods distant from the place of accident. If this testimony were the only items of evidence on this subject, then it would properly present the question whether it was competent as evidence of constructive notice to the town; but the record shows that, before any objection was interposed by the defendant to this class of evidence, plaintiff's witnesses Meyer, Fritz, and Roesing on direct examination without objection, and on cross-examination by the defendant, had testified fully on this subject, giving a full description of the general condition and the defects in the highway in the vicinity of the place where the accident happened. We find no request by defendant to have this evidence stricken from the record. Under this state of the case we cannot perceive how defendant was injured by the reception of the evidence objected to and in having it submitted to the jury with other like evidence in the case received without objection. Defendant, having acquiesced in permitting a considerable amount of such evidence to be received in the case, could not be injured by other items of the same kind of evidence, for it is apparent that this additional evidence on the same subject was simply cumulative and could not operate to his injury. Therefore its reception was not prejudicial error.

It is urged that the witness Kennedy, one of the supervisors of the town, was improperly required to state on cross-examination whether he had not heard of other accidents having occurred at this place in the highway before this one.

The witness had on direct examination for defendant denied having any information of the defective condition of the highway. This cross-examination was to the point that he had notice of prior accidents and thus learned that the road was insufficient. The question of notice was at issue, and this evidence was proper as tending to show that the witness, a town officer, had such notice.

Another exception urged relates to evidence of statements by plaintiff's father and another to a supervisor, immediately after the accident, to the effect that they pointed out to him the place and the insufficiency in the highway. Since the defendant claimed that the town was misled by inaccuracies in the notice as to the actual place of accident and its indefiniteness in describing the defect, this evidence was pertinent as tending to show that the officers were informed of the place and the insufficiency in the road, and hence were not misled by the notice as claimed by the defendant.

It is contended that the reception of evidence of the fact that the road was graded and repaired soon after the accident was prejudicial. This evidence was not proper to prove that the highway was insufficient at the time of the accident; but the defendant attempted to establish by evidence that for a considerable period immediately preceding the time of the accident the highway could not be worked and repaired on account of its wet condition, and offered evidence tending to show that the wet condition of the road prevented repair of it to improve its condition for travel. The evidence of immediate repair after the accident tended to refute this claim of the defendant and was therefore properly submitted to the jury. It also appeared that this repair was made at the place of accident, and therefore was evidence to refute defendant's claim that the town was in fact misled in discovering the insufficiency complained of by defects in the notice.

A further contention is made that the admission of the evidence of the superintendent of roads, to the effect that he

was informed where the stake of the woodrack broke and where plaintiff fell off the wagon, was prejudicial. This testimony tended to rebut the evidence of defendant's other officers that the town officers were ignorant of the place of injury and were therefore misled by the defective notice, and also tended to show that the superintendent was in fact informed of the place where the plaintiff claimed the accident happened. Nor do we perceive any error in not permitting defendant on cross-examination to ask this witness if he had not heard that this stake broke at a place remote from the place where plaintiff claimed it broke. This inquiry in no way tended to impeach or modify his evidence given on direct examination, nor would it elicit anything that was proper and relevant to the defense.

Defendant requested that certain questions covering the issues of notice to the town and contributory negligence be submitted. This was practically complied with by inserting in the verdict appropriate questions covering these issues, though they differed in form and phraseology from those requested.

The court instructed the jury:

"It is also an undisputed fact that one stake of plaintiff's rack, on or within which his wood was loaded at the time of accident, and used to hold his load of wood in place, broke as plaintiff's wagon struck the hole at the place of the accident."

This instruction is assailed upon the ground that it wrongfully assumes that it is undisputed by the evidence that the stake broke at the place where the plaintiff claims the accident happened and that the alleged defect caused it to break. There is no dispute in the case that if the stake broke at the place of accident it was caused by the wagon's wheel suddenly dropping into the hole in the road. It is, however, argued that there is evidence tending to show that some wood had fallen from the wagon at points remote from the place alleged to be the place of accident, and that this indicated

that the stake might have broken before the accident occurred. There is nothing to show that this wood came from plaintiff's load, nor is it such evidence as naturally tended to show that the stake was broken before plaintiff reached the place of accident. On the other hand, plaintiff explicitly testifies that the stake was not broken before he reached the place of accident and that nothing had occurred theretofore to break it. It also appears that the stake was found under the pile of wood at the place where the jury found the accident happened. These positive facts, together with the circumstances of the case, leave room for but one inference, namely, that the stake was broken at the place where the jury found the accident happened. This justified the court in assuming that the stake broke when plaintiff struck the hole at the place of accident.

We find that the instructions given in connection with question 7 of the special verdict are a correct statement of the rules of law applicable to this issue, and that they do not assume any fact to the prejudice of appellant.

We find no prejudicial error in the record.

By the Court.—Judgment affirmed.

BLANKAVAG, by guardian *ad litem*, Respondent, vs. BADGER BOX & LUMBER COMPANY, Appellant.

September 11—September 29, 1908.

Master and servant: Injury to minor servant: Failure to give him proper information: Burden of proof: Instructions to jury: Prejudicial error: Special verdict: Witnesses: Credibility.

1. In an action for injuries sustained by a boy while operating a machine in defendant's factory, a charge to the jury which in effect put upon defendant the burden of proving affirmatively that proper instructions as to the adjustment and operation of the machine had been given to plaintiff, is *held* to have been prejudicially erroneous, notwithstanding a general statement in

the opening part of the charge that the burden of proving his contentions was upon the plaintiff.

2. In an action for injuries sustained by a servant the burden of proof upon the issue of contributory negligence or assumption of risk is upon the defendant.
3. Questions relating to mere evidentiary facts should not be submitted in a special verdict.
4. Where a decision in a party's favor depends largely upon the weight to be given his own testimony, the court should, upon request, instruct the jury that in considering the weight to be given his testimony they should consider his interest and the motive which he has to testify favorably to himself.
5. Where a witness has wilfully testified falsely as to any material fact, the jury may disregard all his testimony except as it may be corroborated by other credible evidence.
6. A requested instruction that, if the jury found that any witness had wilfully testified falsely as to any material fact, they might disregard all his testimony except as it might be "corroborated by other evidence in the case," was defective because of the omission of the word "credible" before the word "evidence."
7. Although a requested instruction is a fair statement of the law on the subject, if it is a general instruction, not applying to any question of the special verdict, the refusal to give it is not error.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Plaintiff, a boy sixteen years of age, was injured while at work on a recessing machine planing out a recess in a board by shoving it over the top of a table in which is set a cutter head. The negligence alleged was that the machine was defective, unsafe, and out of repair, and the knives unguarded and contained no contrivance to prevent the operator being injured, which facts were known to defendant but not to plaintiff; that plaintiff was inexperienced and ignorant of the danger, which was known to defendant, and was set to work without warning or instruction. The answer denies negligence and sets up affirmatively contributory negligence. The jury returned the following verdict:

"1. Did the plaintiff receive personal injuries of the character alleged while operating defendant's recessing machine at the time, place, and in the manner alleged? *A.* Yes.

"2. What was plaintiff's age at the time of said injury? *A.* Sixteen years.

"3. Was said machine so constructed as to be dangerous to one operating it with reasonable care, who was without previous experience in operating the same, and who had not been previously instructed as to how it should be operated? *A.* Yes.

"4. If you answer question 3 'Yes,' did the plaintiff at the time of the injury know, or in the exercise of reasonable prudence and care ought he to have known, that the machine was so dangerous? *A.* No.

"5. At any time before the accident did the plaintiff understand and appreciate the precise danger to which he was exposed in operating the machine? *A.* No.

"6. Ought the plaintiff, considering his age, intelligence, experience, and judgment, in the exercise of due care to have discovered and understood before the accident the precise danger to which he was exposed in his work of operating the machine? *A.* No.

"7. Had the plaintiff, at any time before the day he was injured, done recessing upon the machine in question? *A.* No.

"8. If you answer question 7 'Yes,' then had plaintiff, before he was injured, done recessing with the guard or roller marked 'G' down, as shown on photograph, Exhibit 2? *A.* No.

"9. If you answer question 3 'Yes,' did defendant's superintendent, Vandenbrook, before plaintiff was injured, give plaintiff proper instructions or information as to how the machine should be adjusted and operated so as to prevent accident and avoid danger? *A.* No.

"10. If you answer question 9 'No,' was such failure by defendant's superintendent properly to so instruct and inform plaintiff the proximate cause of the accident and plaintiff's injuries? *A.* Yes.

"11. Did plaintiff in any respect fail to exercise ordinary care, which proximately caused or contributed to produce the accident? *A.* No.

"12. In what sum do you assess the plaintiff's damages? *A.* $3,000."

Motions for judgment in favor of the defendant on the evidence and to change the answers to the questions in the special verdict were denied, and judgment entered for plaintiff on the verdict, from which this appeal was taken.

For the appellant there was a brief by *Kreutzer, Bird & Rosenberry,* attorneys, and *Goggins & Brazeau,* of counsel, and oral argument by *C. B. Bird.*

For the respondent there was a brief by *James L. Kelley* and *W. E. Wheelan,* and oral argument by *Mr. Kelley* and *Mr. John F. Kluwin.*

KERWIN, J. 1. Error is assigned because the court refused to render judgment for defendant upon the undisputed evidence and change the answers of the jury to the questions in the special verdict. This contention is based upon the argument that there was no evidence of negligence because of failure to warn and no evidence of any notice to defendant that the plaintiff did not in fact comprehend all that a person of his age and intelligence ought reasonably to be expected to know, and therefore there was no duty to instruct unless the defendant ought reasonably to have anticipated that the plaintiff would not know or ought not to be expected to know the danger. A discussion of the evidence under this head would serve no useful purpose. It is sufficient to say that we think there was ample evidence to carry the questions involved to the jury.

2. Error is assigned respecting the charge of the court on the ninth question of the special verdict. The ninth question reads:

"If you answer question 3 'Yes,' did defendant's superintendent, Vandenbrook, before plaintiff was injured, give plaintiff proper instructions or information as to how the machine should be adjusted and operated so as to prevent accident and avoid danger?"

Upon this question the court charged as follows:

"If you shall answer question 3 'Yes,' in effect that the machine was dangerous, as set forth in that question and heretofore explained, you should then answer question 9 'Yes' or 'No,' according to the fact as from the whole evidence you shall believe the fact to be, whether or not Superintendent Vandenbrook, before plaintiff was injured, gave plaintiff proper instructions or information as to how the machine should be adjusted and operated so as to prevent accident, etc. (If you shall be so affirmatively satisfied that the superintendent, before the accident, gave plaintiff such proper instructions or information, such as were or ought to have been reasonably sufficient, under the circumstances, to apprise one of the plaintiff's age and apparent intelligence how the machine should be adjusted and operated so as to prevent accident, if operated with reasonable care, in such case your answer to question 9 should be 'Yes.') (Otherwise, if you shall not be affirmatively satisfied, in the manner stated, that the defendant's superintendent, before the accident, gave plaintiff such proper instructions or information as to the adjustment and operation of the machine, as before explained, in such case your answer to question 9 should be 'No.')"

This charge was clearly erroneous, since it did not put the burden of proof on this question upon the plaintiff, but told the jury in effect that if the evidence was evenly balanced, or there was such doubt or uncertainty in their minds that they were unable to state what the fact was, then they were required to answer the question "No," as they did answer. This instruction was prejudicial and must work a reversal. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442; *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 60 N. W. 250; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809.

It is not seriously contended by counsel for respondent that this instruction was not erroneous, but it is insisted that it was not prejudicial error. A very lengthy and able

argument is presented by counsel for respondent in support of their contention. It is argued that, taking the charge as a whole, no prejudice resulted from the part referred to above; and reliance is placed upon the opening part of the charge, namely:

"Defendant denies, and thereby puts in issue, all and every of plaintiff's said allegations of fault on defendant's part; and plaintiff is thereby charged with the burden of affirmatively proving the truth of said contentions, if he would recover in this action."

There is some force in this argument, but the statement is a general statement regarding the whole case, and it cannot be said to outweigh a specific instruction upon a particular subject or question. When the jury were charged upon a particular question and their attention directed particularly to it, we cannot say that such erroneous instruction upon a vital issue in the case was cured by general language referring to the plaintiff's whole case. Indeed, it is quite likely that the jury was much more impressed with the instruction on the particular question than by any general language referring to the issues generally.

We are also cited to sec. 2829, Stats. (1898), to the effect that the court shall disregard any error which shall not affect the substantial rights of the adverse party. But the difficulty with this argument is that we cannot say the error did not affect the rights of the defendant. Many other propositions are argued under this head by counsel for respondent, and many authorities cited, all of which have received due consideration by the court, but a discussion of them here would unnecessarily prolong this opinion. It is sufficient to say that we think the error committed was prejudicial.

3. Error is also assigned because the court put the burden of proof upon the defendant on questions 7 and 8, and it is insisted that the burden of proof should have been put upon the plaintiff. These questions were obviously put to the

jury on the issue of contributory negligence, or that branch of it known as assumption of risk, and upon such issue the burden of proof was upon the defendant; hence there was no error in the instructions. It will also be noted that these questions relate to evidentiary facts, and need not necessarily have been put in the special verdict at all. It would doubtless have been more in harmony with the rules of this court pertaining to the formation of special verdicts to have omitted them.

4. The defendant claims error because of the refusal of the court to give the following requested instruction:

"The plaintiff in this action is an interested party, and in considering the weight which should be given to his testimony you should consider the fact of such interest, and the motive which he has to testify to such statement of facts as will be favorable to himself, and a like test should be applied to the evidence of any other interested witness."

This instruction seems to be in substantial compliance with the rule laid down by this court in *Kavanaugh v. Wausau,* 120 Wis. 611, 98 N. W. 550. Where a decision in a party's favor depends largely upon the weight to be given his own evidence, and a request to give such an instruction as above is made, it is error to refuse it where the principle embodied in such instruction is not covered by the charge.

Error is also assigned because of failure to give the following requested instruction:

"If you find that any witness has wilfully testified falsely as to any material fact, you are at liberty to disregard all the testimony of such witness, except as it may be corroborated by other evidence in the case."

The instruction asked is defective because of the omission of the word "credible." In other words, it should have read "corroborated by other *credible* evidence in the case," instead of "corroborated by other evidence in the case." *Hart v. Godkin,* 122 Wis. 646, 100 N. W. 1057. With the word

"credible" in, it would have been a correct statement of the law, and in a proper case the refusal to give it would be error. The rule as to when it should be given and when not is clearly laid down by this court in the late case of *Pumorlo v. Merrill,* 125 Wis. 102, 103 N. W. 464.

Error is also assigned because the court refused to give the following instruction asked by defendant:

"The defendant company had a right to assume that the plaintiff was possessed of the usual faculties ordinarily developed in a boy of his age and size; in other words, that he was a person of common sense for one of his years, and that he would exercise such care to avoid dangers which were visible and which he knew or ought to have known existed, as might be reasonably expected of one of his years and capacity."

This instruction is a fair statement of the law on the subject in a proper case, but it was a general instruction, not applying to any question of the verdict; hence the refusal was not error. *Odegard v. North Wis. L. Co.* 130 Wis. 659, 685, 110 N. W. 809.

Other errors assigned need not be considered, since the questions involved therein are not likely to arise on another trial.

It follows from what has been said that the judgment below must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

HOFFMAN, by guardian *ad litem*, Respondent, vs. RIB LAKE LUMBER COMPANY, Appellant.

September 12—September 29, 1908.

Master and servant: Injury from uncovered gearing: Questions for jury: Negligence: Contributory negligence: Special verdict: Evidence: Immaterial error: Excessive damages.

1. In an action for injuries to a minor employee caused by his coming in contact with an exposed gearing in defendant's sawmill, the evidence is *held* to sustain findings in a special verdict that such gearing was so located as to be dangerous to employees in the discharge of their duties, that it was not securely guarded or fenced, that defendant was guilty of negligence in that respect, and that plaintiff was not guilty of contributory negligence.

[2. Whether sec. 1636*j*, Stats. (1898),—providing that gearings so situated "shall be securely guarded or fenced,"—imposes upon the employer an absolute duty to keep them so guarded, is not determined.]

3. A question in the special verdict, "Did the plaintiff in any manner fail to use ordinary care which proximately caused or contributed to produce the accident?" which the jury answered "No," is *held*, in the light of the charge to the jury, to have been understood and answered by them as if it read, "Did the plaintiff in any manner fail to use ordinary care, which *failure* proximately caused or contributed to produce the accident?"

4. Error in permitting a witness who had worked in five or six different sawmills to testify that gearings therein in situations similar to that of the gearing in question were covered was not prejudicial, defendant's duty to cover the gearing in question being imposed by statute.

5. An award of $5,000 for injuries to a boy, whose leg was lacerated for a distance of fourteen to sixteen inches between the knee and hip and a portion of the muscle of his thigh torn out, and the use of whose leg was permanently impaired to a great degree, is *held* not excessive.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Charles A. Vilas, for the appellant, cited, among other authorities, sec. 1636*j*, Stats. (1898); *Powalske v. Cream*

City B. Co. 110 Wis. 461, 86 N. W. 153; *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Carey v. C., M. & St. P. R. Co.* 61 Wis. 71, 20 N. W. 648; *Upthegrove v. Jones & A. C. Co.* 118 Wis. 673, 96 N. W. 385; *Bigelow v. Danielson,* 102 Wis. 470, 78 N. W. 599; Vilas, Special Verdicts, § 25.

For the respondent there was a brief by *E. C. Pors & D. D. Conway,* attorneys, and *Geo. L. Williams,* of counsel, and oral argument by *Mr. Conway* and *Mr. Williams.*

Among other references upon the part of the respondent were the following: *Revolinski v. Adams C. Co.* 118 Wis. 324, 95 N. W. 122; *Grant v. Keystone L. Co.* 119 Wis. 229, 96 N. W. 535; *Kelleher v. M. & N. R. Co.* 80 Wis. 584, 50 N. W. 942; *Nadau v. White R. L. Co.* 76 Wis. 120, 43 N. W. 1135; 20 Am. & Eng. Ency. of Law (2d ed.) 147; *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Ewen v. C. & N. W. R. Co.* 38 Wis. 613; *Jensen v. Hudson S. Co.* 98 Wis. 73, 73 N. W. 434; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816.

TIMLIN, J. The plaintiff, an infant employee of defendant, recovered in the circuit court for Wood county judgment for $5,000 damages for personal injuries incurred by plaintiff coming in contact with an exposed gearing in the defendant's sawmill. A jury by special verdict found the facts generalized as follows: At the time the plaintiff was injured he was acting within the scope of his ordinary duties as employee and at a place at which he was directed to work by the assistant foreman. The gearing in which plaintiff was caught was so located as to be dangerous to plaintiff and other employees of defendant while performing like services and while in discharge of their ordinary duties as such employees. It was not securely guarded or fenced, and the defendant was in this respect guilty of negligence which was

the proximate cause of the injury to plaintiff. There was the finding upon contributory negligence of the plaintiff hereinafter referred to, and the damages were fixed at $5,000.

Errors are assigned in denying the defendant's motion for a nonsuit, and later its motion to direct a verdict, and later its motion to order judgment for defendant or grant a new trial. These points may be considered together so far as they are based upon alleged inadequacy of proof. Error is assigned in framing the special verdict, in the admission of evidence of a custom in sawmills to guard like gearings, and it is claimed that the damages awarded are excessive. We take up these points in order.

There was evidence tending to show that extending to the west from near the back or west end of a saw for about seventy feet is a series of short parallel rollers, twenty-one in number and three and one-half feet apart from center to center, and each about that length, so that the whole, with the frame supporting them and with the top of that frame decked or covered beween the rollers, formed a sort of long, low table about three feet seven inches wide, seventy feet long, and twenty-nine inches high. Rotary motion was communicated to each roller from a horizontal shaft running along the south side of said table near the south end of the rollers at right angles to the rollers and at a height of twenty inches from the mill floor, and connected with each roller by a bevel gearing. This shaft is driven by a perpendicular shaft coming up through and extending eighteen inches above the mill floor at right angles to the horizontal shaft and engaging with the latter by means of a bevel gearing, which latter is the gearing upon which plaintiff was hurt. This upright driving shaft comes up through the mill floor and engages with the horizontal shaft at some distance west of the saws and at a point in said roller table just east of where a number of floor chains, forming a carrier for edgings and waste material and moving upon drums north-

wardly, cross under said roller table in a direction at right angles to the long extension of said roller table. In the operation of the mill these floor chains sometimes clog with refuse, and the employees were required to remove this accumulated refuse. In doing this it was customary to stand on the roller table and use a pick, but it was also feasible to stand on the mill floor near the angle formed by the roller table extending east and west and the floor chains extending north and south and crossing under the roller table close by where the gearing in question stood.

Immediately before his injury the plaintiff was ordered to this position on the floor for the purpose of removing the refuse clogged in the east side of the floor chains. The gearing in question was covered by a plank twelve inches wide and two inches in thickness lying flat three or four inches over the gearing, extending one and one-half inches further south than the southmost part of the gearing, and the gearing was inadequately covered on the south side at the time of the injury. This uncovered side of the gearing was the side nearest to any person who might be standing on the floor in the angle formed by the roller table and the floor chains, and it was not unusual for the floor chains to become clogged, and employees were expected in that case to remove the accumulated material. From the foregoing the jury might well find that the gearing in question was so located as to be dangerous to employees in the discharge of their duties.

It is next contended that the evidence establishes without dispute that the gearing in question was originally covered on its south side, but that at the time of the injury the board on the south side had become broken or split off, leaving it partially uncovered; that there is no proof that this existed a sufficient length of time before the injury to plaintiff to charge the defendant with negligence. The statute (sec. 1636*j*, Stats. 1898) provides that gearings so situated

"shall be securely guarded or fenced," and it is quite possible this statute casts the duty upon the employer to keep such gearings securely guarded or fenced. If such is the law, the evidence in this case leaves no room for doubt that at the time of the accident the gearing in question was not securely guarded or fenced. But we find it unnecessary to determine this in the instant case because it is clear there is a conflict of evidence, which was resolved by the jury against the defendant, as follows: Several witnesses testified that at the time of the injury to plaintiff and for some time previous there was no board or guard on the south of this gearing. One witness testifies that about a week or a week and a half prior to the accident he had put water and oil on this gearing and it was not then covered, and several witnesses testified that the board on the south side of this roller table, which should have served as a guard or fence to this gearing, did not reach to the west as far as the gearing, but terminated six or eight inches eastwardly of the gearing. On the other hand, the witness for the defendant testified that this board extended to the west of the gearing six or eight inches, and would have covered the gearing on the south but for the fact that a piece was split off the board. No one offered to prove when this piece was split off. But the board was not a movable appliance, and if it was fastened so that the board failed to reach or cover this gearing it might have been so fastened by those who exercised the right and duty to place the board there. The position of this board was a fact to be ascertained by the jury, and the inference from the fact that it was not shown to have been broken off at the end and that it was fastened up in such position that it did not extend to the gears in question was an inference to be drawn by the jury. These were items of evidence from which the jury could infer, as against the evidence on the part of the defendant, that the gearing in question had never been covered on the south since that board was placed there either in the original

construction or in some subsequent repair of the mill. This makes it unnecessary to determine what would have been the result had it been shown by uncontroverted evidence that the gearing had been covered and continued to be covered until a short time before plaintiff's injury, when it was accidentally or intentionally and without the knowledge of the master uncovered, or what would have been the result in the different case of a plaintiff, in an action for personal injuries sustained by coming in contact with a gearing or appliance required by this statute to be fenced or guarded, not offering any evidence to show for what length of time the appliance had remained unfenced or unguarded.

The question of plaintiff's contributory negligence was for the jury. He was called upon to remove this debris which clogged the floor chains at or about thirty minutes past 5 o'clock in the afternoon of November 8th. The lights were at some distance from this gearing and the gearing was in the shadow of the slightly overhanging top plank. The place at which he stationed himself in order to do this work appears to have been such as to facilitate the doing of the work under the particular conditions of clogging then present. He would naturally be obliged to stoop down. There was a projecting set-screw in the collar of the perpendicular driving shaft just below the crown gear, and in doing his work he might naturally and accidentally, but while in the exercise of due care, have brought his trousers in contact with either the set-screw or the gearing, or both. This whole question was for the jury.

The seventh question of the special verdict is as follows: "Did the plaintiff in any manner fail to use ordinary care which proximately caused or contributed to produce the accident?" The jury answered this question "No." Taking the literal meaning of this question and answer, we have a finding that the plaintiff did use ordinary care of that kind which caused or contributed to cause the accident. This is

nonsense. It is remarkable that a question in this form should escape the scrutiny of court and counsel and be submitted to the jury. But the court instructed the jury with reference to this question that if the plaintiff failed in any respect, however slight, to exercise ordinary care, and such failure on his part proximately caused or contributed to produce the accident, in such case they should answer this question "Yes." But if the plaintiff did not in any respect fail to use ordinary care and thereby cause or contribute to produce the accident, in such case this question should be answered "No." This charge informed the jury that of the sentence forming the question, that clause beginning with the word "which" should be understood as adverbial rather than adjective, or, in other words, to modify the word "fail" rather than the word "care," and that it should be understood as if it read as follows: "Did the plaintiff in any manner fail to use ordinary care, which failure proximately caused or contributed to produce the accident?" Considering the question and the instructions explaining it together, it seems reasonably certain that the jury understood it in this way, particularly in a case where the question and answer would be otherwise meaningless.

A witness called for the plaintiff testified that he had worked in five or six different sawmills, and was asked whether the gearing and shafting situated similar to the gearing and shafting in question were in those other mills covered. This was objected to as incompetent, and it seems to us that the objection was well taken. But, the statute having imposed upon the defendant the duty of covering the gearing in question, it was in no wise prejudiced by an attempt, however successful or however feeble or insufficient, to prove a corresponding common-law duty.

It is contended that the damages awarded are excessive, and we would have been better satisfied with the result had the circuit judge reduced this verdict by $1,000 or $2,000.

But the wound was unusually severe and painful and there is some degree of permanent impairment. The wound is described as fourteen to sixteen inches long and five or six inches wide, extending from slightly above the knee toward the hip, lacerating the skin and tearing out portions of the muscle of the thigh. Part of this muscle had to be cut away, skin grafting took place, the wound has broken out again several times since the plaintiff left the hospital, it has left a scar nine or ten inches long and five or six inches wide, has taken away permanently part of the muscles of the thigh, and permanently impaired the use of his leg to a great degree. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

APPLETON WATER WORKS COMPANY, Respondent, vs. CITY OF APPLETON, Appellant.

September 12—September 29, 1908.

Appeal: Correction of judgment: Subsequent appeal: Mandate construed: Interest on recovery against municipal corporation: Demand.

1. The decision of a question by this court, even if erroneous, is not subject to correction after the term upon an appeal from the judgment of the trial court entered in accordance therewith.
2. This court having, upon a former appeal, directed judgment in plaintiff's favor "based upon and measured by the provisions and terms of" a certain contract, it is *held* that plaintiff's right to recover interest was not then determined, but must depend upon the terms of the contract and the acts of the parties with reference thereto.
3. Except as otherwise provided by statute, after a claim has been properly presented to a municipal corporation and payment duly demanded such claim will draw interest if interest would be allowable on a like claim against an individual.
4. Even where the time of payment for service rendered to a municipal corporation, as well as the amount, is definitely fixed by

contract, a demand for payment is necessary to create a default which will start the running of interest.

5. Where a city charter provides that no action shall be maintained against the city upon any claim or demand until it shall first have been presented to the council for allowance, a claim for services rendered will not draw interest until so presented.

6. A water company, which had been furnishing water to a city under a contract providing for certain rentals payable every six months, asserted that such contract was no longer in force and that it would thereafter furnish water at an increased rate and would exact monthly payments for the service. Afterwards, in an action to recover such increased rentals as upon an implied obligation of the city to pay what the service was worth, it was decided that the original contract was still in force, and plaintiff was permitted to recover in accordance with its terms. The city had at all times been ready and willing to pay on the basis of that contract. *Held*, that there had been no such demand as would start the running of interest upon the sum due on the contract.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

This case was before this court on a former appeal and is reported in 132 Wis. 563, 113 N. W. 44. Reference is made to that case for a statement of the facts material to be considered upon this appeal.

After the record was remanded to the trial court, judgment was rendered in that court in favor of the plaintiff and against the defendant for $3,904.27 damages and $396.33 costs, making an aggregate of $4,300.60. The judgment for damages included interest to the amount of $693.02, interest having been computed on the balance due under the terms of the contract from the time it became due until the date of the rendition of the judgment. The allowance of such interest is the error upon which defendant relies for a reversal of the judgment.

For the appellant there were briefs by *Greene, Fairchild, North & Parker,* counsel, and oral argument by *B. H. Stebbins.* They argued, among other things, that the mandate of the supreme court is not now open to amendment or con-

struction. Anything omitted therefrom must have been intentionally so omitted. The failure to provide affirmatively for interest is conclusive that interest cannot be allowed. *Whitney v. Traynor,* 76 Wis. 628; *Ludington v. Patton,* 121 Wis. 649, 664; *Everett v. Gores,* 92 Wis. 527; *Jennings v. Parr,* 66 S. C. 384, 44 S. E. 962; *Meyer v. Kohn,* 33 Cal. 484; *In re Washington & G. R. Co.* 140 U. S. 91, 94; *The Glenochil,* 128 Fed. 963; *Green v. C., S. & C. R. Co.* 49 Fed. 907. Recent cases show the practice of this court to direct in the mandate the allowance of interest, when interest is proper. *Forster, W. Co. v. F. MacKinnon Mfg. Co.* 130 Wis. 281, 293; *Brillion L. Co. v. Barnard,* 131 Wis. 284, 303; *Loverin & B. Co. v. Travis,* 135 Wis. 322. Municipal indebtedness will not carry interest, in the absence of an express contract to pay interest, until after demand and refusal of payment. *Carr v. State ex rel. Coetlosquet,* 127 Ind. 204, 11 L. R. A. 370, 375; *Savings & L. Soc. v. San Francisco,* 131 Cal. 356, 63 Pac. 665; *State ex rel. Parrott v. Board of Pub. Works,* 36 Ohio St. 409; *Tillson v. U. S.* 100 U. S. 43; *Pekin v. Reynolds,* 31 Ill. 529, 532. Municipal corporations differ from other debtors in that the law does not penalize them with interest for failure to pay their debts when due, but only after a proper demand has been made upon them and payment has been refused. *Donnelly v. Brooklyn,* 7 N. Y. Supp. 49, affirmed 121 N. Y. 9, 24 N. E. 17; *Taylor v. Mayor,* 67 N. Y. 87, 94; *O'Keeffe v. New York,* 176 N. Y. 297, 298; *Grant Co. v. Lake Co.* 17 Oreg. 453, 21 Pac. 447; *Savings & L. Soc. v. San Francisco,* 131 Cal. 356, 63 Pac. 665; *Boott C. Mills v. Lowell,* 159 Mass. 383, 34 N. E. 367; *Chicago v. People ex rel. Norton,* 56 Ill. 327, 334; *Vider v. Chicago,* 164 Ill. 354, 45 N. E. 720; *Peoria v. Fruin-B. C. Co.* 169 Ill. 36, 48 N. E. 435; *Danville v. Danville W. Co.* 180 Ill. 235, 54 N. E. 224; *Coles Co. v. Goehring,* 209 Ill. 142, 70 N. E. 610, 616; *O'Herrin v. Milwaukee Co.* 67 Wis. 142.

For the respondent there was a brief by *Quarles, Spence*

& Quarles, attorneys, and *George Lines,* of counsel, and oral argument by *Mr. Lines.* They contended, *inter alia,* that upon default in its contract obligations the city must pay interest the same as a private contractor. Upon the principles applicable to private contracts interest has been adjudged against the state: *Martin v. State,* 51 Wis. 407; *State ex rel. Sloan, S. & M. v. Warner,* 55 Wis. 271. Against a county: *Land, L. & L. Co. v. Oneida Co.* 83 Wis. 649; *Rice v. Ashland Co.* 114 Wis. 130; *Spooner v. Washburn Co.* 124 Wis. 24, 35, 36. Against a city: *Kluender v. Milwaukee,* 57 Wis. 636. Against a town: *Mills v. Jefferson,* 20 Wis. 50; *Packard v. Bovina,* 24 Wis. 382. These decisions are in harmony with the great weight of authority elsewhere. *Respublica v. Mitchell,* 2 Dall. 101; *Milne v. Rempublicam,* 3 Yeates, 102; *Swann v. Turner,* 23 Miss. 565; *In re O'Berry,* 179 N. Y. 285; *Harrodsburg W. Co. v. Harrodsburg* (Ky.) 89 S. W. 729; *Lonsdale Co. v. Woonsocket,* 25 R. I. 428, 56 Atl. 448; *New Orleans v. Fisher,* 180 U. S. 185; *Louisville v. Henderson's Trustee* (Ky.) 13 S. W. 111; *Barfield v. Louisville* (Ky.) 64 S. W. 959; *Coan v. Brownstown Tp.* 126 Mich. 626, 86 N. W. 130; *Koshkonong v. Burton,* 104 U. S. 668; *Toledo C. E. Co. v. Toledo,* 13 Ohio Dec. 137; *Cooke v. Saratoga Springs,* 23 Hun, 55. Cases holding interest not recoverable on county or town orders are not applicable since they are governed by special statutes.

BARNES, J. Considerable discussion is devoted to the proposition that the mandate of this court expressly prohibited the entry of any judgment for interest. If the former judgment of the court passed upon that question adversely to the plaintiff, it is not now subject to correction, even if the conclusion were conceded to be erroneous. *Everett v. Gores,* 92 Wis. 527, 66 N. W. 616; *Ledebuhr v. Wis. T. Co.* 115 Wis. 214, 91 N. W. 1012; *Hocks v. Sprangers,* 113 Wis. 123, 136, 87 N. W. 1101, 89 N. W. 113. We do not con-

strue the decision or mandate of the court as foreclosing the plaintiff on this question. The plaintiff was simply relegated to its rights under the contract. The city was "contending that it is liable only for the amount stipulated in the contract of November 4, 1881." Judgment was authorized "in plaintiff's favor for the several months' service for which this action is brought, based upon and measured by the provisions and terms of the contract of November 4, 1881," less offsets, and judgment was ordered in favor of the plaintiff "in accordance with this opinion." 132 Wis. 575, 113 N. W. 49. It was clearly the purpose of the court to give such judgment to the plaintiff as it was entitled to upon the established facts under the contract in question. If that contract and the subsequent action of the parties entitled the plaintiff to interest, then there is nothing in the former decision which precludes a recovery of such interest. If plaintiff is not entitled to recover interest under the contract and the acts of the parties in reference thereto, then there is nothing in the judgment or decision of this court which confers upon the plaintiff a right to such interest.

Neither are we disposed to follow those cases which hold that a municipal corporation is not liable for interest on an indebtedness due from it in the absence of an express promise to pay. If the question is an open one in this state at all, no good reason is apparent why, after a claim is properly presented to a municipal corporation and payment is duly demanded, such claim should not draw interest if interest would be allowable on a like claim against an individual. This statement has, of course, no reference to statutory provisions exempting municipalities from the payment of interest on certain kinds of indebtedness.

One of the substantial contentions of the appellant is that the claim of the plaintiff did not begin to draw interest until after a demand for payment was made, and that no such demand was made in this case as would entitle the plaintiff to

interest. The consolidated claims were not founded on express contract, but were based on an implied obligation to pay what the services were reasonably worth. Nothing was due on the express contract until August 1, 1904, yet claims aggregating $6,000 were filed before that time. Nothing was due on account of the services rendered for August, September, and October, 1904, until February 1, 1905, yet long prior to that time appeals had been taken from the action of the common council of the city of *Appleton* on bills rendered for those months, and the causes had been noticed for trial. This court permitted a recovery on an express contract where suit was brought on an implied one, not because the plaintiff was strictly entitled to such judgment on the issues raised, but because the indebtedness on the express contract was admitted and no good reason was apparent why the litigation should not be brought to a close. The time of payment for the service rendered, as well as the amount of it, was definitely fixed by the contract. If private individuals were involved, no demand for payment would have been necessary to start the running of interest. With municipal corporations the rule is different, in some jurisdictions at least, and a demand of payment is held necessary to create a default on the part of such corporations so as to set interest running. The principle upon which this distinction rests is that the law does not contemplate that a public officer shall leave his office and search out the creditor and tender him in currency or otherwise the amount of his bill. The number of bills paid by a city in the course of a year is large, and, if the treasurer were obliged to search out each claimant and pay him what was due him, an onerous burden would be imposed upon such officer. The universal practice is for the creditor to seek his debtor and demand payment of the obligation when that debtor is a municipal corporation. We think it is the duty of the creditor to make such demand, and that until it is made the municipality is not in default.

This view of the law is supported by the following decisions: *Donnelly v. Brooklyn,* 7 N. Y. Supp. 49, affirmed *S. C.* 121 N. Y. 9, 24 N. E. 17; *Taylor v. Mayor,* 67 N. Y. 87, 94; *O'Keeffe v. New York,* 176 N. Y. 297, 298, 68 N. E. 588; *Boott Cotton Mills v. Lowell,* 159 Mass. 383, 34 N. E. 367; *O'Herrin v. Milwaukee Co.* 67 Wis. 142, 30 N. W. 239.

Besides, the charter of the city of *Appleton* provided (sec. 25, subch. V, ch. 47, Laws of 1876; sec. 24, subch. V, ch. 441, Laws of 1885) that "no action shall be maintained . . . against the city, upon any claims or demands of any kind whatsoever, whether arising from contract or otherwise, until such person shall have first presented such claim or demand, duly verified under oath, to the common council for allowance." Other charter provisions required the audit of such claims and their allowance by the common council before any order should be drawn in payment thereof. These provisions required the presentation of the plaintiff's claim for hydrant rental before any action could be begun to recover the same. *Oshkosh W. W. Co. v. Oshkosh,* 106 Wis. 83, 81 N. W. 1040; *Vogel v. Antigo,* 81 Wis. 642, 645, 51 N. W. 1008; *Fleming v. Appleton,* 55 Wis. 90, 12 N. W. 462; *O'Donnell v. New London,* 113 Wis. 292, 296, 89 N. W. 511; *Morrison v. Eau Claire,* 115 Wis. 538, 541, 92 N. W. 280; *Bunker v. Hudson,* 122 Wis. 43, 50, 99 N. W. 448.

In this case the plaintiff did not make any demand under the contract which was held to be in force. It was entitled to six months' rental on August 1, 1904, and to a like amount on February 1, 1905. It asserted that the contract was no longer in force, and that it was entitled to monthly payments, based upon an implied obligation to pay what the services were worth, instead of on an express contract under which it was entitled to semi-annual payments. It claimed nearly $300 per month more than it was entitled to receive. The city might well have disallowed the bills and stopped there. Plaintiff never evinced any intention to accept or

receive the amount legally due it. Its action on the consolidated claims might well have been dismissed, in which event it would have been required to make a new demand based on its contract. It would not be entitled to interest until such demand was made. It was not the intention of this court, either express or implied, to give any undue advantage to the plaintiff by directing judgment in its favor in this case. The testimony shows that the defendant stood ready and willing, at any time a demand was made upon it under the terms of the contract, to pay on that basis. The fact that its allowances fell short by $1.32 of the amounts that would be due for eight months' rental upon the contract basis was in all probability due to the fact that the plaintiff filed its February bill, presumably on the contract basis, for $1,019, instead of $1,019.16⅔. The additional allowance of sixteen and two-thirds cents per month would undoubtedly have been made if the plaintiff had asked for it. From an equitable standpoint the plaintiff was not injured by the failure of the city to include this sixteen and two-thirds cents per month in its offer to pay. The plaintiff might have taken $1,219 on account of August early in September, $1,219 for September early in October, and $1,219 for October early in November. It was not entitled to any of these amounts until the following February. Had it accepted the offer of payment made, it would have had the use of these sums for several months, which, if placed at interest, would have amounted to much more than $1.32. In any event the record clearly shows that defendant was ready and willing to pay upon the basis of the contract as soon as anything became due thereon at any time the plaintiff was willing to take what it was entitled to. We conclude that a demand was necessary, and that no such demand was made in this case as would start the running of interest on the sum for which judgment was ordered.

Furthermore, the city was relieved from making any al-

lowance or offer of payment on the basis of the contract held to be in force. On February 20, 1904, the plaintiff repudiated the obligations of its contract and stated that in lieu thereof it would furnish water at a materially increased rate, and that it would exact monthly payments for the service it rendered. This notice advised the city that monthly payments of $1,500 would be received in payment for the water used by it, and nothing less. Under this declaration an offer of a less amount would be wholly unavailing. Interest to the amount of $693.02 was erroneously allowed in the judgment appealed from.

The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment in favor of the plaintiff and against the defendant for $3,607.58.

By the Court.—It is so ordered.

LESSIG, Respondent, vs. LESSIG, Appellant.

September 12—September 29, 1908.

Divorce: Opening default: Discretion: Appealable order: "Relief granted to plaintiff" exceeding demand: Division of property: Prejudicial error: Revision of judgment as to children.

1. There having been no abuse of discretion in an order denying a motion to open a divorce judgment and set aside defendant's default, the appeal from such order is dismissed.
2. In an action by the husband for divorce he had judgment by default. A division of his property was adjudged, although not asked for in the complaint. *Held*, that such division was not "relief granted to the plaintiff" which, under sec. 2886, Stats. (1898), could not exceed that demanded in the complaint. *Hoh v. Hoh*, 84 Wis. 378, distinguished and questioned.
3. Neither an award of alimony nor a division of property being demanded in the complaint, the adjudging of such division is not ground for reversal on an appeal by the wife, she not being aggrieved thereby.

4. The provisions of secs. 2362, 2363, Stats. (1898), authorizing revision and alteration of a judgment of divorce in respect to the care, custody, maintenance, and education of the children, become in legal effect a part of the judgment; and although a judgment purports to "wholly" release the husband from the support and education of children it is nevertheless open for revision in that respect.

APPEAL from a judgment and an order of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Appeal from order dismissed; judgment affirmed.*

This is a divorce action brought by the husband, alleging desertion, and praying for dissolution of the marriage, for costs, and for general relief. The summons and complaint were personally served on the defendant, who made default, and judgment was rendered on March 18, 1907, dissolving the marriage, giving the custody of the infant child of the parties to the defendant, providing that the plaintiff turn over to the defendant $400 as a final division of the property of the parties, and that plaintiff be wholly released from any care, maintenance, or education of the child or for the support of the defendant.

More than a year after the entry of the judgment the defendant made a motion, based upon affidavits and a proposed answer, to set aside the judgment and for leave to defend. This motion was resisted upon opposing affidavits and denied by the court May 11, 1908. From this order and from the judgment (except those parts thereof granting the divorce and awarding the custody of the child to the defendant) the defendant appeals.

The cause was submitted for the appellant on the brief of *W. E. Wheelan.*

For the respondent there was a brief by *Goggins, Brazeau & Briere,* and oral argument by *Charles E. Briere.* To the point that under a prayer for general relief the trial court may grant alimony or a division of the property as ancillary to the action, even though the same is not prayed for in the complaint, they cited *Zuver v. Zuver,* 36 Iowa, 190; *Hills*

v. Hills, 94 Ind. 436; *Zulier v. Zulier* (Ohio) 56 N. E. 661, 664; *McEwen v. McEwen,* 26 Iowa, 375; *Darrow v. Darrow,* 43 Iowa, 411; *Gimmy v. Gimmy,* 22 Cal. 633; *Munroe v. Munroe,* 20 Oreg. 579; *Twing v. O'Meara,* 59 Iowa, 326, 13 N. W. 321.

WINSLOW, C. J. 1. The motion to open the judgment and set aside the default and allow the defendant to plead was a motion addressed to the sound discretion of the court. There were a number of affidavits on both sides, and the question whether the defendant showed facts which should be held to excuse the neglect was a fairly debatable one. It is not deemed necessary to review the affidavits. We have carefully examined them and have concluded that there was no abuse of discretion in denying the motion. Under these circumstances the appeal from the order must be dismissed. *R. Connor Co. v. Goodwillie,* 120 Wis. 603, 98 N. W. 528.

2. Upon the appeal from portions of the judgment different questions are presented. As to that portion of the judgment making final division of the property, it is claimed by appellant that there should be a reversal upon the ground that no such relief is demanded by the prayer of the complaint, and that under sec. 2886, Stats. (1898), and the case of *Hoh v. Hoh,* 84 Wis. 378, 54 N. W. 731, this portion of the judgment must be reversed. That was a case where the wife brought the action and prayed only for allowance of alimony, and it was held that upon default a judgment for division of the husband's property could not be sustained because it was not demanded in the complaint. The sweeping provisions of sec. 2364, Stats. (1898), which provide that either alimony or division of the property may be adjudged upon *every* divorce from the bond of matrimony except when granted for adultery of the wife, were not mentioned or considered. Whether that decision would be adhered to in view of the further fact that the public interest in the support of the wife after divorce is always involved may be doubtful,

but, however that may be, we do not consider that decision as controlling here. In the present case the husband brought the action, and the division of his property and awarding a portion of it to his wife was not in any true sense "relief granted to the plaintiff," but rather relief granted to the defendant. But even if it be regarded as relief granted to the plaintiff, and the principle decided in *Hoh v. Hoh* be considered as correct, still there can be no reversal; for, if division of the property could not be awarded under the complaint, no more could alimony, because neither is demanded, and so the defendant secures by the judgment just so much more than could properly be given her, and hence cannot be considered as aggrieved. On the other hand, if *Hoh v. Hoh* be not followed, then it was within the power of the court to award either alimony or division of the property, and, the evidence not being preserved by bill of exceptions, we cannot say that there was any error in awarding a division. So, whatever view be taken of the matter, this part of the judgment must be affirmed.

As to that part of the judgment purporting to "wholly" release the plaintiff from the support and education of the minor child, this provision must be read in connection with secs. 2362, 2363, Stats. (1898), which authorize the insertion of provisions for the care, custody, and maintenance of the children in a judgment for divorce, and empower the court, upon petition, to revise and alter such provisions from time to time as circumstances may require. These provisions in legal effect became a part of the judgment, and under them this judgment is open for revision in these respects upon proper petition and showing at any time notwithstanding the use of the word "wholly."

By the Court.—The appeal from the order is dismissed, and those parts of the judgment appealed from are affirmed without costs, except that the respondent is required to pay the fees of the clerk of this court to be taxed.

STATE, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

September 14—September 29, 1908.

Constitutional law: Regulation of interstate commerce: Powers of Congress and of the states: Restricting hours of labor of telegraph operators, etc.: State law conflicting with act of Congress.

1. Regulation of the relation between master and servant as to acts done in interstate commerce, including restriction of the hours of labor, is within the power to regulate commerce among the several states, conferred upon Congress by sec. 8, art. I, Const. U. S.
2. State legislation which directly and intentionally controls and regulates interstate commerce is prohibited; but an indirect or remote influence upon such commerce is not universally sufficient to invalidate an act of a state legislature within its police power.
3. The right of the state, in the exercise of its police power, to protect its citizens generally from perils resulting from excessive hours of labor by railroad employees, is not impaired by the federal constitution except as such legislation shall interfere with or restrain interstate commerce in a respect in which Congress has to some extent acted upon the general subject.
4. Regulation of the hours of labor of telegraph operators and train dispatchers on railroads in a state is within the power of the state, even though interstate commerce may be indirectly affected thereby, so long as Congress has not acted in the matter; but when Congress has enacted a law regulating or restricting the hours of service of operators engaged in interstate commerce, regulation of those hours either directly or indirectly is beyond the power of the state.
5. The act of Congress of March 4, 1907, limiting, after March 4, 1908, the hours of service of operators and train dispatchers employed by carriers in interstate commerce to nine hours in any twenty-four hour period in certain places and to thirteen hours in others, was a clear declaration that that particular subject should be under federal and not state regulation.
6. Ch. 575, Laws of 1907 (sec. 1816*m*, Stats.), prohibiting after January 1, 1908, any corporation operating a line of railroad in whole or in part in this state from requiring or permitting any operator to remain on duty for more than one period of eight

consecutive hours, is in conflict with and in negation of the act of Congress of March 4, 1907, and cannot be enforced as to operators engaged in the moving of interstate trains or traffic.

7. Ch. 575, Laws of 1907 (sec. 1816*m*, Stats.), cannot be limited in its operation to employees engaged exclusively upon trains or business wholly within the state, and be sustained and enforced to that extent, because such a limitation is contrary to the express terms of the act; because it is not clear that the generality of the restriction was not an essential element of the entire legislative scheme; and because the impracticability of limiting hours devoted to domestic commerce alone is so obvious as to preclude belief in any such legislative intent.

8. The act of Congress of March 4, 1907, being limited in its operation to carriers engaged in interstate commerce and to the conduct of their employees so engaged, to the exclusion of any who might be engaged purely in the domestic affairs of the employer, is valid.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Action for penalty under ch. 575, Laws of 1907, for that on the 11th day of January, 1908, one McGrath was a telegraph operator in defendant's station at Milwaukee engaged in reporting and receiving orders affecting the movement of cars, engines, and trains of the defendant company, and operating signal devices; that on said day the defendant required, allowed, and permitted said McGrath to be and remain on duty for said defendant twelve consecutive hours, not by reason of any casualty upon said railroad.

The answer set up numerous separate defenses, most of them attacking the validity of the state law as inimical either to the Fourteenth Amendment of the United States constitution or to certain provisions of our own constitution, and some of them asserting certain technical grounds of escape from the words of the act. By the second and fifth defenses it was set forth that the defendant's road ran through several states; that it was engaged in both interstate and intrastate business by the same employees, trains, cars, appliances, and track; that it was unavoidable that the same operator should

work upon all trains passing over the same division of the road, both those whose termini were wholly within the state and those which crossed the state line; that it was wholly impossible that either class of trains should be directed or governed by a separate man; that during the excess time of employment of McGrath there was one train as to which he made reports, received orders, etc., which ran wholly within the state and carried nothing of interstate commerce, but that the great majority of trains in any way acted upon by him were interstate commerce trains; that any attempt to separate interstate from domestic commerce in the operation of trains and the regulation thereof by said operatives would result in great danger, delay, interference, and expense to the interstate commerce; that the statute in question was therefore void as restricting and regulating interstate commerce in defiance of the constitution of the United States conferring upon Congress the power to regulate such commerce, and also of the act of Congress of March 4, 1907 [ch. 2939, 34 U. S. Stats. at Large, 1415, U. S. Comp. Stats. Supp. 1907, p. 913], which prescribed a different and longer service for the same employees.

The separate defenses of the answer were each met by a separate demurrer, except the first, which merely denied indebtedness for the penalty. The court below sustained the demurrer to all of said defenses except the first. The defendant declining to amend, judgment was entered for the plaintiff for the sum of $1,000 with costs, from which the defendant appeals.

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* attorneys, and *Burton Hanson,* of counsel, and a reply brief by *Burton Hanson,* attorney, and the cause was argued orally by *Mr. Hanson* and *Mr. Van Alstine.*

For the respondent there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, *F. E. McGov-*

ern, district attorney, and *N. L. Baker,* assistant district attorney, and the cause was argued orally by *Mr. Baker.*

DODGE, J. The primary and most earnestly argued question is whether the act (sec. 1816*m,* Stats.; Laws of 1907, ch. 575) prohibiting a corporation operating a line of railroad, in whole or in part, in this state, to require or permit any (telegraph or telephone) operator (including train dispatcher) to remain on duty for more than one period of eight consecutive hours, so regulates interstate commerce intentionally or by necessary effect that it invades the power conferred upon Congress by sec. 8, art. I, Const. U. S., "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," that it cannot stand.

That the regulation of the relation between master and servant as to acts done in interstate commerce is within the power thus conferred upon Congress is authoritatively decided by the *Employers' Liability Cases,* 207 U. S. 463, 494, 28 Sup. Ct. 141. It is categorically so declared in the opinion of the court, although three of the five justices who concurred in the decision withheld their assent from this proposition, which, however, received the approval of the three justices who dissented from the ultimate decision. We can discover no distinction in principle between the subject of regulation considered in that case, namely, the responsibility of the employer for injuries to an employee, though due to the negligence of a fellow-servant, and the subject of the act under consideration, which is the prohibition of employers from imposing upon employees excessive hours of labor. Both must seek their justification for governmental action in the same principles and reasons, either in the protection of a class of employees from requirements hurtful to them, or in the protection of the welfare and safety of the public and of the commerce from dangers supposed to arise by reason of burdensome responsibilities or perils imposed upon the

employees of railroads. While the thing primarily regulated is not commerce, the regulation of the conduct of the individual while engaged in carrying on that commerce so directly affects it that the latter is thereby regulated.

But the mere fact that in some degree interstate commerce is affected by the act of a state legislature is not universally sufficient to condemn that act. The power of the state to control the conduct of individuals therein for the safety of the community is not taken away by the provision of the federal constitution above mentioned merely because some fanciful or remote influence upon interstate commerce may result. Property may be taxed upon its value, although that value in part depends upon a franchise, or ability to use it, in interstate commerce, even though it may appear that the increased burden of taxation upon it must be paid out of the earnings of interstate commerce, and that, therefore, the charges upon such commerce will probably be increased. Dishonest practices by peddlers may be forbidden and punished by a state, notwithstanding they are practices by which some peddlers effect sales in the course of interstate commerce. *Henderson B. Co. v. Kentucky,* 166 U. S. 150, 17 Sup. Ct. 532. On the other hand, state legislation is prohibited which directly and intentionally controls and regulates interstate commerce, as, for example, an act which in terms limits freight or passenger charges for interstate carriage, or which imposes a direct prohibition or charge upon the importation of property from one state into another. *Wabash, St. L. & P. R. Co. v. Illinois,* 118 U. S. 557, 7 Sup. Ct. 4; *Bowman v. C. & N. W. R. Co.* 125 U. S. 465, 8 Sup. Ct. 689; *Covington & C. B. Co. v. Kentucky,* 154 U. S. 204, 14 Sup. Ct. 1087. Between these two extremes, however, lies a broad field for legislation claimed to be justified by necessary protection of the safety of the local community, which more or less directly obstructs, restrains, and regulates the transaction of interstate commerce—legislation not en-

acted for that purpose, but incidentally having the result. The supreme court of the United States, in *Covington & C. B. Co. v. Kentucky, supra,* has classified that field into three classes of legislative acts: The first, where the states have plenary power and Congress has no right to interfere, which concern the strictly internal commerce of the state, and, while the regulation may affect interstate commerce indirectly, its bearing is so remote that it cannot be termed in any just sense interference. The second includes cases of what may be termed "concurrent jurisdiction," where the states may act in the absence of Congressional action. Obviously this field must be one where Congress has right and power to act if it sees fit, but where some restraint and regulation is necessary, and the authority therefor is deemed to be conceded to the states pending nonaction of Congress. The third is the class where, from the very intimacy with, and directness of effect upon, interstate commerce of any legislative action, and national scope of the subject of legislation, it is presumed that the refraining of Congress from promulgating any regulations is intended to declare a policy that the subject shall be free from regulation.

Pretty obviously, under the decisions of the supreme court of the United States, the act we are considering must fall in the second class. The safety of the public may be so imperiled by the employment of incompetent or disabled persons in and about railroads, navigation, and the like that the necessity for some legislation in regard thereto is manifest, and the forbearance of Congress to legislate might well be deemed significant of its policy to leave the subject of regulation to the legislatures of the several states. In this line it has been held that examination of pilots or railroad engineers with reference to physical capacity, especially color blindness, as a condition of their employment, is competent for a state. *Smith v. Alabama,* 124 U. S. 465, 8 Sup. Ct. 564; *Nashville, C. & St. L. R. Co. v. Alabama,* 128 U. S.

96, 9 Sup. Ct. 28. As pointed out in the latter case (128 U. S. 101, 9 Sup. Ct. 29): "Such legislation is not directed against commerce; it only affects it incidentally." In the former case it is suggested that acts much more intimately connected with the commerce itself would be competent, such as those requiring safeguards and signals in running trains, provision for the safety of passengers, regulating the manner of heating cars (*New York, N. H. & H. R. Co. v. New York,* 165 U. S. 628, 17 Sup. Ct. 418), regulating the speed of trains (*Erb v. Morasch,* 177 U. S. 584, 20 Sup. Ct. 819), requiring the stopping of trains at certain stations (*Gladson v. Minnesota,* 166 U. S. 427, 17 Sup. Ct. 627), and others of like import. From these we cannot doubt that prohibition of an overfatigued telegraph operator from directing the operation of trains falls within the state's power to control, even though thereby the conduct of interstate commerce might be impeded or burdened. But this power in the states is subject to that provision in the constitution that Congress shall have power to regulate interstate commerce; that is, to prescribe the restrictions and limitations under which it shall be conducted, and when it prescribes those regulations it does so to the exclusion of state legislation accomplishing a like regulation directly or indirectly, and whether intended for that purpose or not. That is declared in all of the cases above cited, conceding to the states authority over such subjects in the absence of Congressional legislation.

Within the field of authorized Congressional action the federal power must, in the nature of things, be supreme in all parts of the United States.

"This constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Par. 2, art. VI, Const. U. S.

In *Cooley v. Board of Wardens,* 12 How. 299, 318, it was said of this class of legislation:

"It is not the mere existence of such power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of Congressional legislation."

In *Pennsylvania v. Wheeling & B. B. Co.* 18 How. 421, where a state law authorized the building of a bridge over a navigable water, it was declared that even in the matter of a bridge, "if Congress chooses to act, its action necessarily precludes the action of the state." In *U. S. v. C. & N. W. R. Co.* 157 Fed. 321, 330, SANBORN, J., remarks:

"The constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and, if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually. . . . That power is not subordinate, but it is paramount, to all the powers of the states. If its independent and lawful exercise of this Congressional power and the attempted exercise by a state of any of its powers impinge or conflict, the former must prevail and the latter must give way." See, also, *Gibbons v. Ogden,* 9 Wheat. 1, 209, 210.

It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a state will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the subject, the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the states of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power, a declaration of the policy that the subject shall be under federal and not state regulation, and that, therefore, the power shall no longer rest in the state to exercise that authority which by

the constitution of the United States was surrendered to the federal government when and if Congress deemed its exercise advisable.

On March 4, 1907, before the act now under consideration was passed, and even before it was introduced in the Wisconsin legislature, Congress had legislated fully upon the subject of hours of labor for the very class of employees affected by sec. 1816*m*. It then provided (ch. 2939, 34 U. S. Stats. at Large, 1415, U. S. Comp. Stats. Supp. 1907, p. 913) that it should be unlawful for any common carrier subject to the act to require or permit any employee subject to the act to be or remain on duty for a period longer than sixteen consecutive hours, and that no operator or train dispatcher should be required or permitted to remain on duty for a longer period than nine hours in any twenty-four hour period in places continuously operated night and day, nor for a period longer than thirteen hours in places operated only during the daytime, with exceptions in case of emergencies. This was a clear declaration by Congress of a will and policy that, so far as the regulation and safeguarding of interstate commerce might properly be affected by prescribing hours of labor for such employees, the subject should be under control of Congress and not of the state legislatures. Doubtless the state legislatures persisted in their power to protect the safety of their respective communities by reasonably regulating the hours of service of railroad employees, with the limitation, however, that they must not thereby restrict or effectively regulate interstate commerce. Under many of the decisions above cited the state was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from state competency. *State v. Mo. Pac. R. Co.* (Mo.) 111 S. W. 500.

Apart from this view, however, it is too obvious to need more than statement that the legislation fixing nine and thir-

teen hours, respectively, as the permitted term of employment was declaration of a federal policy on that subject, and that a state law excluding interstate railways from the use of their employees on interstate commerce for one of the nine hours or for five of the thirteen hours would be in direct conflict with that policy. The absence of such an employee at a small station upon an interstate road might well be a most serious inconvenience and burden upon both the celerity and safety of interstate commerce past that station, and requirement of such absence would be in direct antagonism to the policy of the federal law permitting presence and employment. Not less obviously the act of Congress declared a policy that interstate railroads should have a reasonable time in which to adjust their business to the new restrictions, by postponing the date when the law should become operative for one year after its passage, thus indicating that such period of time was so necessary to reasonable convenience of interstate commerce. Indeed, this latter implication is not only clear from the act, but made the more certain by reference to the debates and reports of committees attending the consideration and passage of the law of Congress. Hence a state provision to the effect that the time for such preparation and adjustment should be restricted to the 1st of January, 1908, as contained in ch. 575, Laws of 1907, is in direct conflict with the policy of Congress. *State v. Mo. Pac. R. Co., supra.* We are therefore constrained to the conclusion that restriction of hours of labor of telegraph operators engaged in moving interstate trains or traffic is a field of legislation forbidden to the states by the federal constitution; but also that the limitation contained in our statute is in conflict with and in negation of the act of Congress, and cannot be enforced as to such employees.

It may not be out of place to reiterate what has already been said, that the right of the state, in the sincere exercise of its police power, to protect its citizens generally from any

perils resulting from excessive hours of labor by railroad employees, is in no way impaired by the federal constitution except as such legislation shall interfere with or restrain interstate commerce in a respect in which Congress has deemed wise to regulate it. The conduct of persons within the state inimical to public safety is within the police control of the state, whether those persons be engaged in interstate commerce or not, so long as restrictions upon their conduct will not affect the interstate commerce. *Mo., K. & T. R. Co. v. Haber,* 169 U. S. 613, 18 Sup. Ct. 488; *Reid v. Colorado,* 187 U. S. 137, 147, 148, 23 Sup. Ct. 92; *Gibbons v. Ogden,* 9 Wheat. 1, 104; *Asbell v. Kansas,* 209 U. S. 251, 28 Sup. Ct. 485.

The further contention is made by the respondent that, even if it be beyond the power of the state to restrict the services of an operator engaged in moving interstate trains, it is competent to so restrict as to one engaged exclusively upon trains or business wholly within the state, and that the law may be construed as so limited and its validity be sustained to that extent. The principle invoked is doubtless sound, if it is reasonably possible to separate the permissible from the forbidden, and to believe that the legislature intended by the act to affect the one and omit the other. On this subject the *Employers' Liability Cases,* 207 U. S. 463, 28 Sup. Ct. 141, are entirely germane and controlling. It is there pointed out that by its terms that act is aimed simply at the employer, and makes no distinction in denunciation of his acts whether they be done in interstate or intrastate business, so that it in terms regulates purely domestic acts and transactions. Ch. 575, Laws of 1907, is even more objectionable in this regard than the Employers' Liability Act, for it in terms is directed to every corporation operating a line of railroad, in whole or in part, in the state of Wisconsin, thus expressly including those who are engaged in interstate commerce. But it is also open to the other objection,

held to be fatal, that it restricts the employment of all operators without discrimination as to the character of their services. This alone, under the reasoning of the *Employers' Liability Cases, supra,* must condemn the state act; for it is matter of common knowledge, and is set up as a fact by the answer, that any operator who works upon trains or transportation wholly within the state also necessarily and at the same time works upon interstate trains and transportation. *State v. Mo. Pac. R. Co., supra.*

The state legislature has in terms undertaken to restrict hours of work of employees engaged in safeguarding and conducting interstate commerce as well as domestic, and, controlled as we must be by the decision of the federal supreme court, we cannot import a meaning contradictory to the express words. Neither can we feel any certainty that the generality of the restriction was not an essential element in the entire legislative scheme, so that we might believe the legislature would have imposed upon domestic commerce, or on employees exclusively engaged therein, burdens not also resting on entirely similar acts of employees involving interstate trains or commerce.

Apart, however, from the controlling effect of the reasons urged in the *Employers' Liability Cases,* and in addition thereto, we think the impracticability, if not impossibility, of limiting hours of work devoted to domestic commerce alone, is so obvious as to preclude belief in any such legislative purpose. That impracticability is largely shown by facts alleged in the answer, but also by facts which are matter of common knowledge. The direction and dispatching of every train on an interstate railway necessarily involves knowledge in the train dispatcher of all other trains which are in the same vicinity at the same time, and also ability to control such other trains. An interstate train from Milwaukee to Chicago cannot be safely forwarded, if, under the direction of a separate employee, a local train may be moving

between Milwaukee and Racine over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously division of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train dispatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He cannot move or stop the most distinctively local train without affecting the interstate train, or *vice versa*. No extra or special can be put on the division without adjustment of other trains. Of course, also, every interstate train carries some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involved so much of confusion and probability of danger, and its possibility even is so doubtful and experimental, that no legislature would absolutely precipitate it without careful consideration nor without providing in the act for the event of the failure of such experiments. For this reason as well we are convinced that the legislative purpose involved what the legislative words include, the regulation of services of all operators, and would in no wise be satisfied, even in part, by a restriction to those whose acts affect only domestic commerce, if indeed there are any such.

But it is claimed that the federal act of March 4, 1907, itself is unconstitutional upon the same ground that the Employers' Liability Act was so held in the case already mentioned, reported at 207 U. S. 463, 28 Sup. Ct. 141. That case, from amongst great contrariety of opinion of individual justices, finally decided the very narrow proposition that the mere fact that a person or corporation is engaged in interstate commerce does not confer upon Congress authority to

regulate its acts not connected with such commerce. The court took judicial notice of the fact that nearly all railroad companies engaged in interstate commerce are also engaged in business which is purely domestic to some individual state, as, for instance, in transportation wholly within the state, but also in the maintenance of factories and repair shops and other operations in no wise affecting interstate commerce. That law was addressed to every common carrier engaged in interstate commerce, and regulated every such common carrier in its relations with each and every of its employees wholly without regard to the kind of service rendered by such employees. It was held that by its terms it sought to regulate that relation with employees not engaged in interstate commerce—a boiler-maker in its engine shops, a carpenter repairing its warehouses, or a sweeper in the barns of an express company,—and that, therefore, it was not within any power conferred upon Congress, notably not within that to regulate interstate commerce. The act of Congress of March 4, 1907, was passed after that case had been decided in the same way in the lower court, and after a writ of error had been for some time pending in the supreme court, and the department of justice had asked, and been granted, right to be heard on behalf of the United States on the question of constitutionality. The contention of those who attacked the Employers' Liability Law was doubtless well known to the Interstate Commerce Commission and to the Congress. It is therefore entirely natural and probable that an attempt should have been made to differentiate the later enactment from the former one and to escape the somewhat technical ground of invalidity in the former. It is without surprise, therefore, that we find such differentiating provision in the first section, to the effect "that the provisions of this act shall apply to any common carrier or carriers, their officers, agents *and employees* engaged in the transportation of passengers," etc., between the several states; and also: "The

term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any [interstate] train." It will also be noted that the hours of employment are prescribed for "any employee subject to this act." We cannot doubt that by these phrases the operation of the present act was limited not only to employers engaged in interstate commerce, but to the conduct of employees so engaged to the exclusion of any who might be engaged purely in the domestic affairs of the employer, and that by this very distinction and limitation of the application of the act the legislation is brought within that portion of the decision which holds that the Employers' Liability Act would have been valid had it been confined in application to the relation of employees while engaged in interstate commerce. 207 U. S. at p. 496, 28 Sup. Ct. 141.

Since our conclusion is fatal to ch. 575, Laws of 1907, no possible necessity for or benefit from a new trial can result. Hence:

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for the defendant.

COLLINS, Respondent, vs. MINERAL POINT & NORTHERN RAILWAY COMPANY, Appellant.

September 10—October 20, 1908.

Railroads: Injury to trainman from structure near track: Rule construed: Abrogation by habitual violation: Assumption of risk: Evidence: Instructions to jury.

1. A rule of a railway company forbade trainmen to work on the side of cars or trains where there were buildings or other projecting structures. It then instructed them: "Always work on that side where there are no buildings or structures, and in getting on or off or riding on the side of moving cars, do so only at places where there are no obstructions alongside the tracks,

such as buildings, structures, lumber piles, etc., that will make such work hazardous." *Held* that, construing both parts of the rule together, it absolutely forbade trainmen to work or ride on the side of trains where there were any structures alongside the track, not merely when there were such structures as would "make such work hazardous" in the judgment of the particular employee who was doing the work. TIMLIN, DODGE, and KERWIN, JJ., dissent.

2. A trainman who knowingly disobeyed that rule and suffered injury by reason of that disobedience could not recover for such injury without showing that, in the due discharge of his duty, obedience was impracticable or that the rule had been waived or abrogated by habitual disobedience of the employees with knowledge and acquiescence of the company.
3. The habitual violation which would serve to abrogate the rule must have been violation by the defendant company's own employees, not violation by employees of another company from which the defendant had adopted the rule.
4. Where a trainman, while riding on the side of his train, was struck and injured by an ore bin near the track, the mere fact that he had frequently seen the bin and knew in a general way that it was located near the track was not sufficient to show, as matter of law, that he had assumed the risk, it appearing that he had never had occasion to examine its location closely or to take a car from it, and that it had been built only about two months, during about half of which time he was off duty.
5. The admission of evidence that there was ample room on defendant's grounds, so that the ore bin could have been placed two or three feet farther from the rail, was not error.
6. Where a special verdict is to be taken, the refusal of instructions suitable only to a case submitted for a general verdict is not error.

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action for personal injuries.

On and for some time prior to the 28th of September, 1905, the plaintiff, a man thirty years of age, was employed by the defendant as the conductor of a mixed freight and passenger train running between Mineral Point and the village of Highland, about thirty miles distant. This train

was the only train operated on the road, and left Mineral Point about 9 o'clock a. m., reaching Highland at 10:40 o'clock, and on its return left Highland at 2:20 o'clock p. m. and arrived at Mineral Point at 5:15 o'clock. There were three other persons constituting the train crew, viz., an engineer, a fireman, and a brakeman. For three miles after leaving Mineral Point this train ran over the tracks of the Chicago, Milwaukee & St. Paul Railway Company, but the balance of the distance over the defendant's own tracks. The train was generally composed of from one to eight or ten freight cars and a combination passenger coach. After reaching Highland the duties of the train crew were to spot the cars as required, and at about 1:30 o'clock p. m. it was their duty also to make up the return train. The tracks at the station in Highland run nearly east and west. Upon the south side of the track is the station house and upon the north side are two side-tracks. Along the north side of and near to the most northerly of these two side-tracks are several structures designed for use in loading or unloading cars, and among these are a coal shed, a cold storage warehouse, an elevator, and a small ore bin. The ore bin was the farthest east of these structures and was erected some months before the accident, and its south side was about twenty inches from the side of a standard box car as it passed. The plaintiff had seen it numerous times, but had not noticed its distance from the track. This northerly switch track joined the main track about 240 feet east of the ore bin.

On the day of the accident, September 28, 1905, the train crew was making up the train at Highland, under the direction of the plaintiff, preparatory to returning to Mineral Point. The engine backed in on the northerly side-track and was attached to four or five box cars and a cinder dump car, which last-named car was at the extreme west end. The intention was to draw the entire string of cars easterly onto the main track and then cut off a part of them, including the

dump car, and send them onto the main track, and return the remaining cars to the side-track. As the train started east the plaintiff directed the brakeman to go forward on the train so as to be ready to make the cut, while he himself intended to give the proper signals to the engineer or fireman, ride to the switch stand, and there get off and throw the switch. The switch stand was on the north side of the track. As the train proceeded the plaintiff was on the rear of the cinder dump car at first, but went forward, intending to swing himself on the ladder at the west end of the box car immediately ahead (which was a large refrigerator car), and then give the proper signal to the fireman in the engine and drop to the ground at the switch stand to throw the switch. The ladder at the west end of the refrigerator car was on the north side of the car, and the plaintiff reached it, seized the handhold, and swung himself out to get on the ladder just as he reached the ore bin, so that his back struck the southwest corner of the bin and he was knocked to the ground and one foot was partially crushed on the rail, thus sustaining a serious and permanent injury. The negligence claimed was that the ore bin was placed in dangerous proximity to the track and that plaintiff had not been informed of the danger.

The jury returned a special verdict by which they found that (1) the ore bin was placed unnecessarily so near the track as to be dangerous to a conductor or brakeman in the discharge of his duties; (2) that it ought to have been foreseen by the railway officials that an injury might probably occur to an ordinarily prudent trainman as a natural result of the position of the bin; (3) that the plaintiff while discharging his duty was knocked from the side of a car and his foot crushed; (4) that no want of ordinary care on plaintiff's part contributed to produce his injury; and (5) that his damages were $2,000. Timely motions were made for nonsuit and for the direction of a verdict for the defendant, but

both were overruled, and from judgment for the plaintiff on the verdict the defendant appeals.

Calvert Spensley, for the appellant.

E. D. McGowan and *Arthur M. Fisher,* for the respondent.

WINSLOW, C. J. It appeared by the plaintiff's own evidence that he had worked as brakeman or trainman in the employ of various railroad companies since boyhood, and was well acquainted with the ordinary methods of performing such work as well as with the ordinary dangers. For a considerable length of the time he was employed by the Chicago, Milwaukee & St. Paul Railway Company and was familiar with its printed rules, one of which, directed to all trainmen and switchmen, was as follows:

"(2) You are forbidden to work on the side of cars or trains where there are buildings, sheds, cattle chutes, or other projecting structures. Always work on that side where there are no buildings or structures, and in getting on or off or riding on the side of moving cars, do so only at places where there are no obstructions alongside the tracks, such as buildings, structures, lumber piles, etc., that will make such work hazardous."

It further appeared without contradiction that the plaintiff was employed as conductor by the defendant company from January, 1905, when it first began to do business, up to the time of the accident; that the defendant company formally adopted the foregoing rule with other rules of the St. Paul Company at the very beginning of its active business, and gave notice to the plaintiff to that effect, and that the plaintiff fully understood that the rule was in force.

It will be noticed that the rule contains two separate and distinct clauses. The first is an absolute command not to work on the side of cars where there are projecting structures of any kind; the second is an affirmative direction to work on the side where there are no structures, and to get on

or off or ride on the side of cars only where there are no obstructions alongside the tracks, such as buildings, structures, lumber piles, etc., "that will make such work hazardous." Doubtless both clauses must be construed together, and the question is whether the rule so construed forbids trainmen from working or riding on the side of trains where there are any structures alongside the track, or only forbids them from so working when there are such structures as "will make such work hazardous" in the judgment of the particular employee who is doing the work. Unquestionably the latter construction would effectually emasculate the rule, and we cannot consider it a reasonable construction. The rule twice instructs the employee to work on the side where there are *no structures,* once by negative and once by affirmative language, and then proceeds to enumerate several things as being concrete examples of the kinds of obstructions which are covered by the inhibition and which make such work hazardous. The plaintiff so understood the rule, as appears affirmatively from his testimony, for he testified on cross-examination that it contained no exception allowing him to judge whether the building would clear him or not, and that, as the rules read, they forbade him to switch on that side.

With this construction there is no doubt from the evidence that the plaintiff knowingly disobeyed a rule intended for his protection and suffered his injury by reason of such disobedience. Under such circumstances he cannot recover unless he shows either that the rule is impracticable in the due discharge of duty, or that it has been waived or abrogated by habitual disobedience of the employees with the knowledge and tacit consent of the master, or for such a length of time that the master must be presumed to have become aware of such disobedience and acquiesced therein. *Holmes v. So. Pac. Co.* 120 Cal. 357, 52 Pac. 652; 5 Thomp. Comm. on Neg. § 5404, and cases cited. In the present case we find no evidence which would suffice to take to the jury the ques-

tion of impracticability. It was shown that the switch stand was on the north side of the track, and that it was more convenient to do the signaling to the engine from the north side of the train, and thus that it would take somewhat longer to perform the switching operation if the conductor rode on the south side of the car, but there was absolutely no evidence of impracticability, or that the plaintiff did not have ample time to perform the duty in hand in accordance with the provisions of the rule. As to habitual violation of the rule, almost all of the testimony on this point is to the effect that the employees of the Chicago, Milwaukee & St. Paul Railway Company were in the habit of violating the rule. This custom, even if proven, could not, of course, affect the defendant. The habitual violation which will serve to abrogate the rule must be violation by the defendant's own employees. We find no tangible evidence of any such habitual and open violation of the rule by defendant's employees known to and acquiesced in by the defendant's responsible officials, or existing for such a length of time as to raise a presumption of knowledge and acquiescence. A verdict should therefore have been directed for the defendant upon the evidence.

Some other errors are argued which may properly receive attention, as there must be a new trial of the case.

It is said, irrespective of the question of the rule, that the plaintiff assumed the risk because he had frequently seen the ore bin and knew in a general way that it was located near the track. He had never, however, had occasion to examine its location closely or take a car from it, and it had been built only about two months, during about half of which time the plaintiff was off duty. We are unable to say that there was assumption of risk proven as matter of law.

Testimony was received against objection to the effect that there was ample room on the defendant's grounds, so that the company could have placed the ore bin two or three feet fur-

ther from the rail. We see no good ground for the claim of error in this ruling. *Renne v. U. S. L. Co.* 107 Wis. 305, 83 N. W. 473.

A very large number of instructions were asked by the defendant and refused. While it is unnecessary to consider the question of the correctness of the rulings on these instructions, it may be proper to say that nearly all of them were instructions suitable only for a case submitted upon general verdict, and their rejection would not be error in any event.

By the Court.—Judgment reversed, and action remanded for a new trial.

Timlin, J. (*dissenting*). The rule of the defendant which it is claimed was in force and disregarded by the plaintiff is as follows:

"To all trainmen and switchmen: . . . (2) You are forbidden to work on the side of cars or trains where there are buildings, sheds, cattle chutes, or other projecting structures. Always work on that side where there are no buildings or structures, and in getting on or off or riding on the side of moving cars, do so only at places where there are no obstructions alongside the tracks, such as buildings, structures, lumber piles, etc., that will make such work hazardous."

Sec. 1816, Stats. (1898), as amended by ch. 448, Laws of 1903, provides that every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part when any such injury is caused by a defect in any locomotive engine, car, rail, track, machinery, or appliance required by said company to be used by its employees in and about the business of their employment, etc. No contract, receipt, rule, or regulation between any employee and a railroad corporation shall exempt such corporation from the full liability imposed by this section.

Without here further considering the effect of this statute

upon rules and regulations and their violation, I may call attention to the rule in question. It consists of two sentences. The first is a positive prohibition against working on the side of cars or trains where there are buildings, sheds, cattle chutes, or other projecting structures. The second sentence covers the act of riding on the side of moving cars. If the first sentence also covers that act, then these words in the second sentence are unnecessary and tautological. Rules of construction forbid us to so consider them. Consequently the first sentence of the rule does not relate to riding on the side of moving cars. General words in one part may be controlled and restrained by particular words in another. 2 Lewis's Suth. Stat. Constr. (2d ed.) p. 666, § 348, and cases in note 79; *Harrington v. Smith,* 28 Wis. 43.

Statutes should be so construed that effect may be given to all of their provisions, so that no part will be inoperative or superfluous, void, or insignificant. *Ill. Cent. R. Co. v. Chicago,* 138 Ill. 453, 28 N. E. 740; *Harrington v. Smith, supra; Battis v. Hamlin,* 22 Wis. 669. Special provisions relating to a particular subject control general ones to which they are repugnant. *Western Bank v. Tallman,* 17 Wis. 530. If the latter part of a statute be repugnant to the former part it must stand and as to so much repeal the former part. *Woodman v. Clapp,* 21 Wis. 353. This construction is rejected in the majority opinion upon the ground that such construction would emasculate the rule. This is to me a new law for construing statutes or writings. If the masculinity which it is so necessary to preserve is a trope for force or effectiveness, I ask forceful or effective for what? Must the rule be construed to be forceful or effective to defeat the right of the employee to recover? This defeat is an incident which the law attaches to intentional violation of the rule, but it was not the object of the enactment of the rule. The rule is just as forceful and effective as a direction of the mode in which to do the work under the construction here

given it as it is under that construction given in the majority opinion. It is not so forceful or effective to defeat the right of the plaintiff to recover. The viewpoint of the majority seems to me to subordinate the effectiveness of the rule as a direction for work, to its effectiveness as a means of relieving a master from liability.

Next, the first sentence of the rule does not govern this case, because the railroad company placed its switch target and handle on the forbidden side, and the plaintiff was absolutely required to go there and throw that switch in order to make the necessary movement of the train. So far as this first sentence of the rule is concerned, the defendant is deemed to have waived all observance of the rule with respect to throwing that switch because it imposed upon the plaintiff the inconsistent duty of throwing the switch on the forbidden side. *Brown v. L. & N. R. Co.* 111 Ala. 275, 19 South. 1001; *Boyle v. Union Pac. R. Co.* 25 Utah, 420, 71 Pac. 988; *Pa. Co. v. Roney,* 89 Ind. 453; *Hall v. C., B. & N. R. Co.* 46 Minn. 439, 49 N. W. 239; *Richmond & D. R. Co. v. Jones,* 92 Ala. 218, 9 South. 276.

Taking up the second sentence of the rule in question and giving it a fair and lawful construction, it will be seen that the employee is thereby ordered, first, to always work on that side where there are no buildings or structures, which is merely a repetition in another form of the order contained in the first sentence. Then the employee is next ordered that in getting on or off or riding on the side of moving cars he must only do so at places where there are no obstructions alongside the track . . . that will make such work hazardous; that is to say, he is not absolutely forbidden in the last sentence, but he is to determine whether the obstructions, etc., are such as to make the work hazardous, and in that case he is forbidden to get on or off or ride on that side.

When the rules do not unconditionally command the doing or not doing of a particular act, but impose upon the

servant in its observance duties calling for the exercise of judgment, skill, and diligence on his part, the question whether an act of the servant is a violation of the rules is a question of fact. *Lake Shore & M. S. R. Co. v. Parker,* 131 Ill. 557, 23 N. E. 237; *Bucklew v. Cent. Iowa R. Co.* 64 Iowa, 603, 21 N. W. 103. This same rule has been adopted and followed by our court. *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 273, 58 N. W. 408; *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 78 N. W. 446, 778. See, also, a very complete note to *Bist v. L. & S. W. R. Co.* 8 Am. & Eng. Ann. Cases, 1, 21, where other authorities will be found. The case in question comes within the foregoing cases because it is only negligence to ride in this way if there are, to the knowledge of the plaintiff, obstructions, etc., alongside the tracks such as will make this riding hazardous. Anything less than this is not an intentional violation of the printed rule. In order that the violation of a rule be sufficient to charge the servant as matter of law with contributory negligence, that violation must have been intentional. This is the pivotal question in the case. Resolving this against the appellant, it follows that there was no prejudicial error in the admission of evidence or in the verdict, or in refusing the instructions requested. It seems clear to me that the judgment should be affirmed.

DODGE, J. I join in the foregoing dissenting opinion of Mr. Justice TIMLIN.

KERWIN, J. I concur in the foregoing dissenting opinion of Mr. Justice TIMLIN.

State ex rel. Umbreit vs. Helms, Circuit Judge.

September 14—October 20, 1908.

Supreme court: Superintending control of inferior courts: Quashing by trial court of criminal complaint: Review: Mandamus *to compel trial.*

1. The power of this court to exercise its superintending control, under sec. 3, art. VII, Const., always exists when an inferior court either refuses to act within its jurisdiction or acts beyond its jurisdiction to the serious prejudice of the citizen and there is no other adequate remedy.
2. The fact that it becomes necessary to review judicial action of an inferior court is not an insuperable obstacle to the exercise of the power of superintending control in a proper case.
3. With respect to the superintending control of trial courts in criminal actions, any question arising by objection to the proceeding before the jury is impaneled and sworn is a preliminary question.
4. Any erroneous disposition of a criminal case before a jury is impaneled and sworn by which the court below refuses to proceed further with the trial upon a valid complaint, indictment, or information, where it appears that the duty of that court was plain, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate, is sufficient to arouse the jurisdiction of this court under its power of superintending control.
5. Thus, where the circuit court, before entering upon the trial, quashes a valid complaint, indictment, or information charging a criminal offense and discharges the accused, this court, in the absence of other adequate remedy, may, under its power of superintending control, by appropriate writ, require the inferior court to proceed within its jurisdiction and try the accused.
6. The power of superintending control will not be exercised upon light occasion or when other and ordinary remedies are sufficient, but only when the exigency is of such an extreme nature as obviously to justify and demand the interposition of that extraordinary power.
7. The quashing by the circuit court of a complaint charging a person with practicing medicine without having a license or certificate of registration as required by law, is *held* not to create an exigency calling for the exercise of this court's power of superintending control.

Per MARSHALL, J.:

1. The "general superintending control over all inferior courts," granted to the supreme court in sec. 3, art. VII, Const., is not limited other than by the necessities of justice. It extends to judicial as well as to jurisdictional errors.

2. The necessities of justice, in a legal sense, do not reach beyond the scope of governmental policy as to righting wrongs by judicial interference; as for example, it stops in criminal cases at the constitutional prohibition of a second jeopardy.

3. The grant of superintending control, though without specified means or instrumentalities for its exercise, includes by necessary implication all common-law writs and means applicable thereto and all power necessary to make such writs and means fully adaptable for the purpose.

4. The extent of the power of superintending control, as to any particular group of circumstances, is not measurable by that of the common-law writ most adaptable in its ordinary scope to vitalize such power in regard to such circumstances. Such extent is referable to the necessities of the case, and the ordinary-use feature of the writ is to be expanded to meet the exigencies thereof.

5. The common-law writs with the power indicated to adapt them leave no part of the court's superintending control power to be necessarily dormant for want of means to vitalize it.

6. The existence of error in the field of the controlling power does not, necessarily, upon proper request in form, require the doors of the jurisdiction to open. When that should occur rests in sound judicial discretion.

7. By the policy of this court its superintending control power is to be exercised only when the right of the matter involved is plain, there is no other efficient remedy for its invasion or denial, such invasion or denial is prejudicial, and, generally, and especially as to errors not strictly jurisdictional, the case presents circumstances of exceptional or extraordinary hardship.

WINSLOW, C. J., assents to the holding that in a proper case this court will not only review by *mandamus* the action of an inferior court in dismissing a case upon a preliminary question without trial, but will review any ruling which results in the practical throwing of a case out of court before trial upon the evidence—this meaning, as applied to criminal cases, any ruling resulting in dismissal prior to the impaneling of a jury and the placing of the defendant in jeopardy. He also agrees with the conclusion that this case is not of sufficient importance to move this court to action.

Dodge, J., concurring in the judgment, is of the opinion that the power of superintending control conferred on this court by the constitution is coterminous with the power vested in the court of King's Bench; that it extends to a review of decisions on preliminary questions needing to be decided before the trial court can take into consideration the merits of a controversy, but does not extend to a review of a decision that the facts stated in a criminal complaint constitute no offense—that not being the decision of a preliminary question but a decision of the merits upon an issue of law.

Mandamus to Eugene W. Helms, Judge of the Circuit Court for St. Croix County. *Peremptory writ denied.*

Application on the part of the state, through the relator, was made to this court, praying that it exercise its power of superintending control over inferior courts by directing Hon. E. W. Helms, respondent herein and judge presiding of the circuit court for St. Croix county, to set aside an order made by him quashing and dismissing a criminal complaint against one John Till in a criminal action pending in the circuit court for said county against said Till, and to direct said court to reinstate said action and proceed with the trial thereof. This proceeding was commenced upon petition by the relator as attorney for the Wisconsin Board of Medical Examiners, and upon consent granted of the district attorney for St. Croix county and the attorney general of the state of Wisconsin. An alternative writ of *mandamus* was issued out of this court directed to the respondent and served. Due return was made to the writ, admitting substantially the allegations of the petition.

It appears from the admitted facts that on the 24th day of February, 1908, a complaint was made to a justice of the peace of St. Croix county against said John Till upon the charge of wrongfully and unlawfully practicing medicine in this state. The complaint charged:

That "John Till did on the 16th day of December, A. D. 1907, at said county, wrongfully and unlawfully practice medicine, by then and there prescribing, for a fee and for compensation, drugs, medicines, and other medical treatment

to and for one John A. Larson, for the cure and relief of wounds, fractures, bodily injuries, infirmities, and diseases of him, the said John A. Larson, without him, the said John Till, having then and there and theretofore obtained from the Wisconsin State Board of Medical Examiners a license to practice as a physician or surgeon in said state as provided and required by the provisions of chapter 426 of the Laws of Wisconsin for the year A. D. 1903, and acts amendatory thereof, and without then and there having a certificate of registration issued to him, the said John Till, pursuant to the provisions of chapter 87 of the Laws of Wisconsin for the year 1899, and the said John Till not being then or there a dentist or resident refracting optician engaged in the practice of such profession. . . ."

Upon this complaint a warrant was issued and said John Till brought before the justice, tried, and found guilty as charged in the complaint, and sentenced to pay a fine of $100 and costs and to imprisonment in the county jail for a period of three months. From this judgment Till appealed to the circuit court for St. Croix county. The action was placed on the regular calendar, and on the first day of the term, before any jury was impaneled in the case, said defendant, by his attorney, moved the court to quash the complaint and for discharge, for the reason that the complaint did not state facts sufficient to constitute an offense under the laws of Wisconsin. The motion was granted and the court refused to further proceed with the action.

For the relator there was a brief signed by *A. C. Umbreit in pro. per.* as attorney for the Wisconsin State Board of Medical Examiners and by the *Attorney General,* and oral argument by *Mr. Umbreit.*

For the respondent the cause was submitted on the brief of *W. F. M'Nally.*

The following opinion was filed October 20, 1908:

KERWIN, J. The important question presented by the record is whether this court, under its power of superintending control over inferior courts granted to it by sec. 3,

art. VII, Const., has power to review and control the action and determination of the circuit court in respect to the matter complained of. Sec. 3, art. VII, Const., provides:

"The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari* and other original and remedial writs, and to hear and determine the same."

This court has had occasion to pass upon this provision of the constitution at an early day in *Att'y Gen. v. Blossom,* 1 Wis. 317, and many times since. The general scope of the subject has been quite fully covered in former decisions of this court. *Att'y Gen. v. Blossom,* 1 Wis. 317; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Mitchell v. Johnson,* 105 Wis. 90, 80 N. W. 1104; *State ex rel. Fourth Nat. Bank v. Johnson,* 105 Wis. 164, 83 N. W. 320; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *State ex rel. W. G. Taylor Co. v. Elliott,* 108 Wis. 163, 84 N. W. 149; *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587; *In re Gates,* 117 Wis. 445, 94 N. W. 292; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500. In view of what has been said in the above cases, we do not feel that any extended discussion of the history and scope of the doctrine of superintending control under our constitution is necessary. Moreover, we think the case before us is embraced within narrow limits, and the determination of it we regard sufficient without laying down rules for the government of future cases which may arise and require the discussion of legal principles not necessary to be considered here. The words of the constitution granting to this court

the power of superintending control over inferior courts are defined in *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081, and other cases heretofore cited. The question, therefore, arises in the instant case whether when the circuit court, before entering upon the trial, dismisses a criminal complaint, indictment, or information charging a criminal offense, and discharges the accused, this court has power under the authority conferred by the constitution to require by appropriate writ the inferior court to proceed within its jurisdiction and try the accused, where there is no other adequate remedy.

The high prerogative authority, though sparingly used, applies as well to criminal as to civil cases. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 614, 79 N. W. 1081; *State ex rel. McGovern v. Williams, ante,* p. 1, 116 N. W. 225; *State ex rel. Harris v. Laughlin,* 75 Mo. 358; *Benners v. State,* 124 Ala. 97, 26 South. 942; 1 Bishop, New Crim. Proc. § 1402. In *State ex rel. McGovern v. Williams, supra,* the question presented was whether this court has jurisdiction, under its power of superintending control, to compel the circuit court to reinstate a criminal action and proceed to the trial thereof, where the indictment had been wrongfully quashed by the trial court before a jury was impaneled on the ground that the indictment was bad because the grand jury returning such indictment was illegally constituted. In that case this court held the question of whether the grand jury was an illegal grand jury, and therefore the indictment void, was a preliminary question, and that this court could order the trial court to reinstate the case and proceed with the trial of it. That case, we think, is the same in principle as the one now before us. Here the court below held the complaint bad for want of sufficient facts, and there because of illegality of grand jury. In each case, before entering upon the trial, the court passed upon the validity of the indictment, or, to be accurate, in the

one case the complaint and in the other the indictment, and the question is whether an erroneous ruling that the indictment or complaint is bad for want of sufficient facts can be reviewed by this court in a proper case under its power of superintending control.

It will be observed under the rule laid down in the cases before cited, and especially in *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081, that power always exists when an inferior court "either refuses to act within its jurisdiction or acts beyond its jurisdiction to the serious prejudice of the citizen" and there is no other adequate remedy. Does the quashing of a valid indictment charging an offense known to the law and refusal to proceed to the trial of the accused for the offense charged amount to a refusal to act within its jurisdiction? As we have seen, this court held that it was where the ground upon which the indictment was quashed involved a preliminary question, namely, defect in impaneling the jury, and no other adequate remedy existed (*State ex rel. McGovern v. Williams, ante,* p. 1, 116 N. W. 225), and it was said:

"That the act of the circuit court is a refusal to exercise its jurisdiction and perform its duty to consider the criminal charge against the accused seems too plain for discussion."

So we come to the question before us, whether, in the absence of other adequate remedy, this court has power to compel the trial court to assume jurisdiction of a criminal action after it has quashed a good complaint upon the ground that it did not charge an offense. We see no difference in principle between the two cases, hence we think the doctrine laid down in *State ex rel. McGovern v. Williams, supra,* rules this case. The fact that it becomes necessary to review judicial action of an inferior court is no insuperable obstacle to the exercise of the power of superintending control in a proper case. *State ex rel. Fourth Nat. Bank v. Johnson,*

103 Wis. 591, 623, 79 N. W. 1081; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 234, 82 N. W. 158; *State ex rel. Winchell v. Circuit Court,* 116 Wis. 253, 93 N. W. 16; *State ex rel. McGovern v. Williams, supra.* True, the rule is laid down generally in the text-books and decisions of the courts to the effect that *mandamus* issued under the power of superintending control cannot be used to serve the purpose of a writ of error to review judicial action of the trial court. *State ex rel. McGovern v. Williams, supra;* High, Extr. Leg. Rem. (3d ed.) § 188; *State ex rel. Oshkosh, A. & B. W. R. Co. v. Burnell,* 104 Wis. 246, 80 N. W. 460; *State ex rel. Fourth Nat. Bank v. Johnson, supra.* But this general rule, like all others, is subject to its limitations, and it is only necessary to refer here to such as apply to the case before us. Others have been referred to in former decisions of this court where it is held that "this court is not universally restrained from reviewing acts done within the jurisdiction and judicial power of the inferior court in the exercise of superintending control." *State ex rel. McGovern v. Williams, supra; State ex rel. Fourth Nat. Bank v. Johnson, supra; State ex rel. Milwaukee v. Ludwig, supra; State ex rel. Winchell v. Circuit Court, supra.* A well-recognized exception to the general rule is the one laid down by this court in *State ex rel. McGovern v. Williams, supra,* respecting a preliminary question arising in a criminal action before entering upon the trial thereof. Mr. Justice DODGE, speaking for the court, said:

"The courts, English and American, agree with practical unanimity that such preliminary decision, however judicial in character, may be reviewed under the superintending power, and, in case of erroneous decision thereof by the inferior court, the latter should be required, by *mandamus,* to proceed to perform its duty toward the principal controversy notwithstanding its decision upon the preliminary question"—citing a long line of authority, English and American, in support of the proposition.

The cases do not appear to be in harmony as to what constitutes a preliminary question. *State ex rel. McGovern v. Williams, supra.* But we think the better authority and reason support the rule that a preliminary question respecting the control of trial courts in criminal actions arises upon any action of the court which amounts to a refusal to enter upon the trial of the case before a jury is duly impaneled and sworn to try the accused. So that any question arising by objection to the proceeding before the jury is impaneled and sworn is a preliminary question. *State ex rel. McGovern v. Williams, supra,* and cases cited in opinion; *Reg. v. Brown,* 7 E. & B. 757. Indeed, it is not important whether we call the question upon which the court passes and thus assumes to dispose of the case, and refuses to proceed within its jurisdiction, a preliminary question or not. Any erroneous disposition of a criminal case before a jury is impaneled and sworn by which the court refuses to further proceed with the trial upon a valid complaint, indictment, or information, where it appears "that the duty of the court below was plain, the refusal to perform such duty clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate," is sufficient to arouse the jurisdiction of this court under its power of superintending control. *State ex rel. McGovern v. Williams, ante,* p. 1, 116 N. W. 225, and cases cited; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Oshkosh, A. & B. W. R. Co. v. Burnell,* 104 Wis. 246, 80 N. W. 460; *State ex rel. Fourth Nat. Bank v. Johnson,* 105 Wis. 164, 83 N. W. 320; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *Att'y Gen. v. Blossom,* 1 Wis. 317; *State ex rel. Mil. Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State ex rel. Schutz v. Williams,* 127 Wis. 236, 238, 106 N. W. 286; *Reg. v. Brown,* 7 E. & B. 757; Merrill, Mandamus, § 203; *State ex rel. Harris v. Laughlin,* 75 Mo. 358; *State ex rel. New Orleans v. Judge,*

52 La. Ann. 1275, 27 South. 697; *Grand Rapids v. Braudy,* 105 Mich. 670, 64 N. W. 29; *Terrell v. Greene,* 88 Tex. 539, 31 S. W. 631; *State ex rel. Smith v. Smith,* 69 Ohio St. 196, 68 N. E. 1044; *Virginia v. Rives,* 100 U. S. 339; *In re Grossmayer,* 177 U. S. 48, 20 Sup. Ct. 535; *In re Connaway,* 178 U. S. 421, 20 Sup. Ct. 951; *State ex rel. Shannon v. Hunter,* 3 Wash. St. 92, 27 Pac. 1076; *Cassidy v. Young,* 92 Ky. 227, 17 S. W. 485; *McCreary v. Rogers,* 35 Ark. 298; *State ex rel. Keane v. Murphy,* 19 Nev. 89, 6 Pac. 840; *State ex rel. Bayha v. Philips,* 97 Mo. 331, 10 S. W. 855. We therefore conclude that this court has power in a proper case to compel the circuit court to proceed with the trial of a criminal case when it refuses to do so and wrongfully quashes the complaint, information, or indictment upon which the accused is brought to trial before a jury is impaneled and sworn.

2. The next question to be considered is whether an exigency exists for the exercise of the power prayed for in the petition. Assuming, without deciding, that the complaint states a criminal offense and therefore that the court erroneously quashed the complaint, we approach the question of whether a proper case is made calling for the exercise of the power of superintending control. This court has repeatedly held that it should not exercise its power of superintending control upon light occasions or when other and ordinary remedies are sufficient. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Meggett v. O'Neill,* 104 Wis. 227, 80 N. W. 447; *In re Mielke,* 120 Wis. 501, 98 N. W. 245; *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107; *State ex rel. Mitchell v. Johnson,* 105 Wis. 90, 80 N. W. 1104; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158. In *State ex rel. Tewalt v. Pollard, supra,* it is said:

"But this court will not exercise its jurisdiction when there is another adequate remedy by appeal or otherwise, nor

unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort of this state."

In view of the nature of the offense and the facility with which future prosecution may be maintained, should it be found necessary on the part of the state to do so, it is considered by this court that no such serious prejudice will result from the action of the trial court in quashing the complaint as to create an exigency calling for the exercise of the power of superintending control. It therefore follows that the writ should be denied.

By the Court.—The writ is denied.

The following opinion was filed October 20, 1908:

Marshall, J. (*concurring*). Desiring to aid, as best I can, in eradicating any misconception which may exist respecting the scope of the superintending power of this court over other courts and conditions under which such power should be exercised, I supplement the opinion written for the court, by stating in my own way its position as I understand it. The primary question is whether the controversy in this case is within the court's jurisdiction. The secondary question is whether a situation is presented of sufficient gravity to call such jurisdiction into activity. The power, as will be hereafter seen, is one and the all-important thing. In respect to that no discretion whatever exists. The secondary matter appeals solely to the judgment, the discretion, of this court.

While this opinion will be purely personal, its sole purpose is to reinforce what is well said by our Brother Kerwin in the court's opinion, so far as it goes, and to advance further, covering the entire subject, which in my judgment may now be legitimately considered, to the end that the right of the vexing questions which have so often engaged our attention

may some time be permanently set at rest. That such is "a consummation devoutly to be wish'd" all will concur. That it can be accomplished, I can only hope and give my best thought to that end. The magnitude of the difficulties we have had to contend with can be best appreciated when it is understood that,—though we have some sixty years of judicial history behind us, and the important questions involved have many times challenged the attention of the court, and we have the help of all the light the learning of the justices of the past and present could shed upon them, and they were thought in the beginning to have been comprehensively solved in general terms and within the administration of some of the justices now in service to have been solved with particular definiteness,—we find ourselves in the instant case, as we have been at least twice before, quite recently, facing the same questions as still open for debate. The picture thus presented is by no means overdrawn. It appears still more strikingly in view of the fact that the highest court in each of many of the states has from time to time during the past half century dealt with the same or a similar subject, yet uncertainty seems to still exist. If, as the fact seems to be, after all that has been written, the full scope of the highest power of this court, given in plain language, has not been heretofore defined with reasonable clearness, which I am not ready to admit, then no apology is necessary for this independent opinion even though, in view of the clearness with which the court has now spoken, its position seems quite clear as to the particular situation.

In discussing the matter I shall not endeavor to fence it about by precedents found in other jurisdictions, especially by those of the English courts, but deal with principles, and holdings of this court, endeavoring to read therefrom substantial harmony in such holdings with the conception of the court's power entertained by the framers of the constitution, as at the outset here declared, and to show that it ex-

tended beyond mere correction of jurisdictional errors, to the very limits of the necessities of justice, except as barred by some constitutional mandate.

Much difficulty has arisen, it is thought, by regarding cases, especially those in foreign jurisdictions, which went upon the scope of some particular common-law writ specified in our constitution, as marking the limits of power, while the writs are mere conveniences for the exercise of a power existing independently of them. The false premise has at times naturally led to the idea, and given rise to judicial expressions, in terms or in effect, that the power of superintending control appertains only to such errors as may be in some reasonable view classed as jurisdictional. That, as we shall see, was not entertained here at the start, and, notwithstanding expressions from time to time in opinions, to which we shall refer, suggesting the contrary, has never been considerately adopted, if at all, and in recent years has been fully repudiated, though the extent to which judicial errors are subject to correction by use of the power has been left in doubt. Hence the situation we now face. By the last declaration on the subject (*State ex rel. McGovern v. Williams, ante,* p. 1, 116 N. W. 225), the power was, in effect, said to extend to all preliminary questions arising in the course of litigation though they involve correction of erroneous decisions within the inferior court's jurisdiction. No attempt was there made to define the limits of the term "preliminary questions," nor did the court go so far as to hold that its superintending power was limited to such questions. The decision was supported by copious citations of cases foreign and domestic, in the main at least, limited as to field of jurisdiction asserted, by the particular writ with which it was invoked; the general result being, that the wrong dealt with was within the field of the power because within the scope of the writ and jurisdictional in the sense, at least, of being an erroneous refusal to exercise jurisdiction. The case is in har-

mony with the refusal, by a divided court, of jurisdiction in *State ex rel. McGovern v. Williams,* 130 Wis. 588, 110 N. W. 1135, only in that, in the latter, the alleged error was in making an erroneous ruling in favor of the accused on a demurrer to the indictment, and in the former such an error in sustaining a plea in abatement, and some on the first occasion regarded the controversy as involving a judicial error, if error at all, in determining a question not preliminary, while others did not regard the subject of preliminary question material unless viewed so broadly as to reach to the commencement of jeopardy; while on the second occasion all were agreed that the question decided below was strictly preliminary and so in any event the correction of the error was within the scope of the power of superintending control. That left the court's conception of the full scope of its power as uncertain as before.

The last foregoing in advance of a general discussion seemed necessary in order to clear up apparent inconsistency between the result in the two instances mentioned, making it plain that the latter result was reached, logically, without any change of opinion on the part of any one participating in the first and without any purpose of declaring that the limits of the power involved were determinable either by the character of the question to be dealt with, as regards whether preliminary or not, or by the ancient scope of the writ of *mandamus,* which was used to put the power in operation.

Aiming in this opinion to tie closely to the decisions of this court, in the belief that they lead logically and unmistakably to the result reached, I can best commence by quoting the constitutional provision involved (sec. 3, art. VII), dividing the same, as significantly as practicable, into its component parts in harmony with numerous adjudications on the subject.

The supreme court, except in cases otherwise provided in this constitution,

(1) shall have appellate jurisdiction only, . . .

(2) shall have a general superintending control over all inferior courts; . . .

(3) and shall have power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and other original and remedial writs, and to hear and determine the same.

In this connection I will place the provision of the constitution as to circuit courts in order that the distinction between the functions of the specifically named writs in one and the same in the other as repeatedly pointed out here, and as we shall call attention to hereafter, may be easily seen.

The circuit courts shall have original jurisdiction

(1) in all matters civil and criminal . . . not excepted, etc.,

(2) and appellate jurisdiction from all inferior courts and tribunals,

(3) and a supervisory control over the same . . . and "shall also have the power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and all other writs necessary to . . . give them a general control over inferior courts and jurisdictions."

At the first instance of the scope of the provision as to this court coming in question (*Att'y Gen. v. Blossom,* 1 Wis. 317), the opening clause was treated as a limitation and the second and third as separate and distinct grants of power. The writs specifically named in the second were held not to have been so named to afford instrumentalities for the exercise of the first grant of power, the power being ancillary to the latter, but to grant a distinct power of original jurisdiction co-extensive with the scope of the writs by the rules of the common law; that the first grant, as to its scope, is not dependent upon any or all the writs specifically named; that such writs, in their ordinary functions, are not appropriate at all to the exercise of supreme judicial superintending con-

trol over inferior courts. "It is barely possible," said the court, "that some one of them might be adapted to such a function in some specific case; but weighty, powerful, and imposing as such armor is, it is no more adapted to the exercise of a 'general superintending control over inferior courts' than would have been the spear of Goliath to the siege of Acre."

Discussing, in somewhat of a vein of ridicule, the idea that either of the specified writs within their ordinary field is at all suitable to the exercise of the power of superintending control, the court said:

"A *mandamus* cannot go to an inferior court to *control* its action. But it may be issued to put the court in motion. It may be called the moving, not the controlling, agency. A writ of injunction is in no way an appropriate means for exercising a superintending control over an inferior court. . . . It is usually directed to the parties, and not to the court."

In short, it was as definitely determined as any question could well be that the power in question is not limited by the ordinary scope of any one or all of the writs specifically mentioned in the constitution; that the constitutional idea was that the power should be exercised by common-law instrumentalities other than such specified writs, or by legislative means; that the writs were given not ancillary to any grant of power, but for jurisdiction of an original character, though no definite light was shed on the scope, in detail, of the great power under discussion, consistent with the court's conception of the constitution as to ultimate judicial authority. However, it was characterized as "unlimited in extent . . . undefined in character . . . unsupplied with means and instrumentalities." How comprehensive that conception is of the supreme authority to control litigation! How the power grows in one's appreciation as the subject is contemplated! How the idea is dwarfed into insignificance that the ancient functions of the writ of *mandamus* or in-

junction or *procedendo,* or all of them, suggest its boundaries, or that precedents, foreign or domestic, dealing with what may or may not be technically so reached throw any substantial light on the subject!

The court in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 511, dealing primarily with the subject of original jurisdiction, followed without material variations the lines laid down in the *Blossom Case.* The three quoted parts of the constitution, appertaining to this court, were characterized as three separate and entirely independent grants of power, instead of, as before, one a limitation of power and the others grants of power, and since that time the latter treatment of the matter in this respect has been followed. It was said that the second grant was given without any specific means for its exercise, but carried with it by necessary implication all common-law writs suitable thereto, and the power of invention as to any new instrumentalities that might be necessary; that the power was given to round out a single policy to construct a supreme judicial tribunal over the whole state, a court of last resort on all judicial questions under the constitution and the laws of the state, to which was essential this power of "superintending jurisdiction over all other courts *to control the course of ordinary litigation in them.*" *Note the significant words "to control the ordinary course of litigation,"* etc. It was pointed out that the specification of writs common to the two quoted provisions was not made in the same sense in each or for a common purpose. That as to circuit courts the writs were given in aid of jurisdiction, while as to this court they were given for jurisdiction. So in the former their use is as general as is applicable to the jurisdiction to which they are pertinent, while in the latter they are limited to their ancient scope as prerogative writs when used for prerogative purposes.

So it will be seen that the broad scope of the second grant of jurisdiction to this court, as at first laid down, was in the

later case fully vindicated. Its broad and comprehensive character was emphasized at many points, the idea being made prominent that the instrumentalities for its exercise were to be discovered or invented, if need be, the power itself not to fail of efficiency in any given situation because of the ordinary restrictions upon the use of any particular writ or writs; that the constitutional grant was both "compact and congruous in itself," with its own "uniform group of analogous remedies" to be exercised in ways of its own "on many objects, in great variety of detail." The constitution, said the court, "wisely, almost necessarily, stopped with the general grants of jurisdiction, . . . and left details to practice and experience." It will be thus seen that such comprehensive generalization is but another way of stating, as was done before, that the power is "unlimited in extent," "undefined in character," and "unsupplied with instrumentalities." No suggestion is found up to this point that the concept of the constitution makers, as understood by this court, was based upon any model or any idea other than that to so round out supreme judicial authority as to afford a means in any given circumstances of preventing a denial of justice.

Intervening between the two cases above referred to is *State ex rel. Brownell v. McArthur,* 13 Wis. 407, and following them are *State ex rel. Att'y Gen. v. Circuit Court,* 97 Wis. 1, 72 N. W. 193, and *State ex rel. Spence v. Dick,* 103 Wis. 407, 79 N. W. 421. In neither was the scope of the power in question, nor the circumstances under which it should be used, discussed. However, in the first and third cases the error dealt with was strictly judicial and the remedy was allowed solely upon the ground that a clear statutory right had been inexcusably denied and there was no way of righting the wrong by appeal, while in the second case the error involved was jurisdictional and a summary remedy was demanded. So far as such cases throw any light on the subject in hand, an error of a trial court, whether judicial or

jurisdictional, seriously prejudicing the rights of a party in ordinary litigation not remediable by any other efficient remedy, is within the field of the superintending control power of this court. Whether by legislative or judicial policy the exercise of the power may be restricted is a secondary question. The existence of the power does not militate against such power of restriction.

We now come to *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081. There for the first time the scope of the power and the proper instrumentalities for its exercise were called in question and the court, as it was then thought, defined the one and pointed out the other with sufficient clearness to render any further controversy in respect thereto unnecessary. The case has not since been disturbed at any point, and in all subsequent instances of the subject being presented here the controversy involved was treated as ruled by the former adjudication. There was no question in the *Johnson Case* but that the decision of the circuit court for Milwaukee county, which was challenged, was within the range of its judicial authority. The errors complained of were in respect to erroneously making several rulings denying statutory rights, all made judicially but injudiciously. By the proceedings instituted to remedy the mischief it was sought to compel a vacation of all orders interfering with the enjoyment of the rights so denied, to coerce the circuit court into retracing its steps, effacing all of the erroneous rulings from the record, and commencing anew at the point where the erroneous course of action commenced and into proceeding properly; and to fence the jurisdiction closely about as to what was the proper disposition of the controversy, and to reverse if necessary any action interfering with the offending court so retracing its steps.

At the threshold of the case it was insisted that the superintending control jurisdiction of this court was appropriate only for correction of jurisdictional errors and that the

function of the writ of *mandamus,* which was used, in any event, was only appropriate to reach such errors by setting the court in motion, upon the theory that the challenged rulings were usurpations and void. In deciding the case and granting the relief sought all that was said in the *Blossom Case* (*Att'y Gen. v. Blossom,* 1 Wis. 317) and the *Railroad Cases* (*Att'y Gen. v. Railroad Cos.* 35 Wis. 425) as to the general nature of the power of superintending control was referred to with approval. In addition to affirming the declaration that the power was given "without limitations," the court said, in the language of the Missouri court in *State ex rel. Bayha v. Philips,* 97 Mo. 331, 10 S. W. 855, conceiving that such court referred to errors of inferior jurisdictions not otherwise remediable than by an appeal to the supreme superintending power: "The control granted to the court in the particulars mentioned is fettered by no restriction or limitation; it is as broad as the exigency of the case demands." The language of the *Railroad Cases,* that the power was given to enable this court "to control the course of ordinary litigation in" all other courts, was repeated with emphasis. For the purpose of significantly picturing the concept of the framers of the constitution in conferring the power, it was said they had in mind that branch of supreme authority anciently exercised by the sovereign of England, through the instrumentality of his high court, to superintend "all inferior tribunals, . . . to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature has invested them; and this by not only restraining their excesses, but also by quickening their negligence, and obviating their denials of justice." Nothing was said militating against the declarations in previous cases as to the power not being measured by the field comprehended by the ancient use of any particular writ or collection of writs, though, with the grant of power, it was asserted, in harmony with the previous declarations, this court took, by necessary implica-

tion, all common-law writs applicable thereto. But the early suggestion here that the power was given without instrumentalities for its exercise, and the later one that in case of incompetency of common-law writs to that end the court possessed, inherently, the power of invention, enabling it to make new ones; the power referred to by Lord Coke as "a secret in the law," and the early declaration that the writs specifically mentioned in the constitution were wholly unsuitable for vitalizing the power,—were expressly or impliedly disfavored. The writs of *certiorari, procedendo,* and *mandamus* were declared to have been, under the English system, commonly used for the exercise of the superintending control power, and in harmony therewith; that they are the instrumentalities contemplated by the framers of the constitution for the same purpose, and may be used with such freedom as to satisfy all situations liable to arise. The fact that this court thus turned to the writs mentioned as the proper instrumentalities, contrary to the logic of the *Blossom Case,* does not mean the idea was entertained that in their ancient scope they are the measure of the jurisdiction, but rather that in any situation liable to arise one or the other of such writs, the one being selected most suitable under all the circumstances, may be used regardless of whether its ancient use needs expansion beyond its ordinary scope to meet the case or not. That is perfectly apparent from the use there made of the writ of *mandamus* and is rendered unmistakable by this language:

"With the superintending control and the attendant writs this court took all the power necessary to make that control *and those writs effective,* and its arm is not nerveless because no writ may be found in the form books so framed as to meet the emergency. *The writ will be framed to meet the exigencies of the case,* and the court will discharge the duties of the trust reposed with it by the people, *though it becomes necessary to modify and enlarge the terms of the ancient writ.*"

We apprehend no one would seriously contend that the writ ordinarily used only to set in motion, to compel action, not to coerce judicial action in any particular way within the field of judicial judgment, without a radical expansion beyond that field could be used, as it was, to accomplish the result attained in that case and the companion case (*State ex rel. Fourth Nat. Bank v. Johnson,* 105 Wis. 164, 83 N. W. 320), where, as before indicated, the trial jurisdiction was coerced into vacating numerous orders, entered in the field of its authority by the injudicious exercise of power, and rules were laid down fencing such jurisdiction so closely about as to its future action in regard to the matter involved as to leave it very little to do rising above the dignity of a mere ministerial matter, and its order claimed to preclude its further action was in effect reversed.

A study of the court's opinion in the first *Johnson Case,* phrased by the present chief justice in his accustomed concise and clear language, satisfies the writer that a monumental work was there done for the administration of justice in this state. It defined clearly for the first time the nature of the great power lodged in this court. It laid the foundation for its administration so deep and made its import so supremely significant as to obviate any danger of the great trust reposed here not being carefully guarded and its lofty purposes fully vindicated. No other full exposition of the power and the manner of its exercise, so far as the writer can discover, can be found anywhere. The general effect of the case is that, as said in the beginning, the power is unlimited and undefined in the sense that it can have no limitation other than by the possibility of situations which may arise requiring its exercise to accomplish the ends of justice. The concept of the constitution makers, as suggested in the *Johnson Case,* was based on the unlimited authority of the English sovereign as exercised through his court, wherein, in contemplation of law, he was ever present to vindicate the

right upon the same being denied through the ignorance or the negligence or injudicious conduct of an inferior jurisdiction. It is not confined to the correction of jurisdictional errors of inferior jurisdictions, but extends not only to "restraining their excesses," but also to "quickening their negligence" and "obviating their denial of justice." That, we should say in passing, broadly viewed, includes the whole field of competency to err, whether judicially or jurisdictionally. The so-called "secret in the law" as regards inventing, judicially, new instrumentalities for the exercise of the power, is not recognized. Neither does the necessity for instrumentalities unknown to the common law exist.

By the foregoing full force is given to the remarks in the *Blossom Case* that the power in question was conferred with all the writs, instrumentalities, powers, and agencies provided by the common law for the convenient and complete exercise of it. But contrary to the treatment there of the competency of specified writs they are declared to be applicable to its exercise, especially in view of the inherent power of the court to adapt them to situations as they arise, by expansion if necessary, beyond their ancient scope. I suggest in passing that this power of expansion is probably all there is of the so-called "secret in the law" to make new writs; that the expansion of the scope of an old writ, though no new name is coined to characterize it, is, in effect, for the given case, the making of a new writ. The court is, therefore, fully equipped with all the essentials for the convenient and complete exercise of the power of superintending control. Thus the *Johnson Case* left nothing further for future consideration as to fundamentals or details, and unless something has been since decided out of harmony therewith the case in hand clearly falls within the broad scope of that power.

In the second *Johnson Case* it was said that this court under its superintending control power may act upon an in-

ferior court where otherwise valuable rights would be denied "by refusal of such court to exercise or keep or act judicially within its jurisdiction." It is "a power to be used only where there is no other remedy under our judicial system that will meet the situation and prevent irreparable mischief, when that mischief springs from something other than mere error of judgment." That viewed independently of the situation dealt with would suggest that the superintending control power has to do only with jurisdictional error. But, plainly, it is thought, the case then in hand was being characterized without thought of stating a rule of limitation. Again, the term "act judicially," as applied to the facts, was inadvertently used for the term "act judiciously." There was no usurpation involved. Everything done which was challenged, though palpably erroneous, was honestly done and binding on all persons concerned until vacated by or at the command of some higher authority.

With the broad lines laid down in the *Johnson Case* in view the court said in *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226, 237, 82 N. W. 158, 162, speaking of the *Johnson Case:*

"This court decided summary and radical action essential to recall the circuit court from a wholly erroneous policy. . . . It is urged, though the inferior courts be acting within their jurisdiction and exercising merely the judicial powers with which they are vested, this court should interfere to 'control the course of ordinary litigation in such inferior courts,' 'not only by restraining their excesses, but by quickening their negligence and obviating their denial of justice.' That such power is vested in this court cannot be denied, nor that from such power results a duty to exercise it fearlessly and unflinchingly in a proper case." Page 234 (82 N. W. 161).

In *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 512, 107 N. W. 500, 514, the idea expressed in the *Johnson Case* that the "secret in the law" spoken of in

the *Railroad Cases,* as to the inherent power of this court to invent new writs, is too mythical for safe judicial anchorage, was emphasized by the suggestion that the "so-called secret has slept so long as to raise doubts as to whether the framers of the constitution had in mind . . . writs not specifically mentioned other than those then known." All that was said in the *Johnson Case* as to the feasibility of fully vitalizing the power of superintending control by the well-known common-law writs was affirmed and the scope of the jurisdiction as well, but in an attempt to appropriately subdivide the field covered by it and suggest the particular instrumentalities appropriate to each group of circumstances, language was used which, considered apart from the case itself, might well lead to the belief that the scope of superintending power does not extend so far as here indicated to have been established in the *Johnson Case.* But the opinion, as a whole, it seems, shows to the contrary. It was said, in effect, that the power includes (1) the prevention of usurpation by inferior courts, the superintending jurisdiction acting prohibitively; (2) the quickening of judicial action in case of unreasonable delay, setting the same in motion in case of refusal to act and compelling action within the limits of jurisdiction in case of inexcusable excursions beyond the same; (3) the reversal of determinations void for jurisdictional error. A fourth subdivision should have been added, in harmony with the *Johnson Case,* viz., and, generally, to "obviate denials of justice." This last is of the utmost importance. Without it the field cannot be covered. It was not in fact supposed in the classification that the whole subject was comprehended. It was said the outlines of the great power of superintending control mark the boundaries as definitely as they can well be, except by the application of principles to cases as they arise. Experience will demonstrate that, when the right is claimed, superintending control will reach far enough to suit the necessities of the case.

It should be noted that in the *Chittenden Case* the court, or at least the writer in speaking for the court, did not for the time fully appreciate how distinctly the idea of the *Blossom Case,* that the writs commonly used to make the power of superintending control effective are inappropriate thereto, and the affirmance in the *Railroad Cases* that the court possessed some inherent power of invention to enable it to supplement by new writs common-law instrumentalities in case of necessity, had been, subsequent to the *Johnson Case,* recognized as disapproved therein. In *Deuster v. Zillmer,* 119 Wis. 402, 97 N. W. 31, the court, speaking by the present chief justice, declared that "This power of superintending control is to be exercised by the established writs of the common law, at least until the legislature shall provide additional or other means." That is fully justified by the opinion in the former case, as we have seen, and is grounded thereon. It justified the practical denial of the suggested power of invention as to new writs made in the subsequent case.

The foregoing, without referring to other cases which are in harmony therewith, brings the subject under discussion down to date, leaving the first *Johnson Case* as the judicial classic, fully exposing to view the power of superintending control in its fundamentals and details. It has not been, as we have seen, by anything said subsequent thereto and is not liable to be in the future, departed from. The first *Williams Case* (130 Wis. 588, 110 N. W. 1135), it must be said, was a departure to the extent that, *ex necessitate legis,* the court was unable to act. The second *Williams Case* (*ante,* p. 1, 116 N. W. 225), is in harmony or out of harmony according to one's viewpoint, with the failure to act in the first. So far as it goes, it approves the declarations in the *Johnson Case* without limitation, except as it may be read as suggesting that the ordinary scope of the writs used in the numerous cases cited, particularly the English cases, indi-

cates the limits of the power of "superintending control." While that may appear to the casual reader to have been the court's conception of the matter, it was not such in fact, so far as I am aware. The case, of course, was rightly decided, tested by the law of the *Johnson Case,* and the use of the superintending power in the particular instance was fully vindicated upon principle and authority by the forceful treatment of the matter by Mr. Justice Dodge, speaking for the court.

The history we have given leaves nothing to be said to further define the superintending power. The ancient characterization, as we have seen, marks the boundaries, reaching out as far as possible wrongs to be righted for which no other efficient remedy would exist, it being understood that no situation is cognizable, judicially, as involving a wrong, which has been finally judicially closed, so far as the policy of the law designs to furnish a remedy at all. It is difficult to imagine a judicial or jurisdictional error not involving either excessive exercise of power or negligent exercise thereof or denial of justice.

The case in hand, if we assume the trial court's decision to have been wrong, does not involve any jurisdictional error nor a mere preliminary question, if such are to be limited to those arising prior to entering upon the merits of the charge either in reference to the sufficiency of the indictment or the proof to sustain it, but, upon the hypothesis suggested, does involve a denial of justice, presents a case of guilt within reasonable probability and the doors of justice erroneously closed by the trial court and the offender immune and the people remediless.

We now come to the secondary question of whether the court ought to allow its superintending authority to be used in the given case. It by no means follows that, given a wrong within the field of the power, that power should be used as a matter of course to remedy it. The scope of the

power is one thing, the condition under which it should be exercised is another. The former is referable to the constitutional grant, the latter to the sound discretion of this court. For a firm entrenchment of that doctrine in the jurisprudence of this state, we need only turn again to the first *Johnson Case.* The conclusion was there most considerately reached and declared that the rule early established and consistently adhered to as to the exercise of the court's original jurisdiction should be applied to the power of superintending control. Under that rule, as we have before suggested, to invoke the jurisdiction is to appeal to the sound discretion of the court. *In re Court of Honor,* 109 Wis. 625, 85 N. W. 497. So a firm stand was taken against the free use of the superintending power which prevails in some jurisdictions, and notably in that of Michigan, the court declaring that the power was committed "to the court by the people" as a sacred charge *"not to be exercised upon light occasions* or when other remedies are sufficient." The errors there involved were reviewable on appeal, but, under the peculiar circumstances existing, not so as to save the valuable rights of many persons, which were in jeopardy. Such circumstances were of the most extraordinary character that could be imagined, both in respect to the magnitude and number of interests involved and the inexcusable though honest course of their treatment. No counterpart thereto can be found in the history of litigation contained in our reports. It is aptly characterized to that effect in *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 236, 237, 82 N. W. 158, 162. These essentials to a situation warranting the use of the superintending power were there restated from the *Johnson Case:*

"The duty of the court must be plain, the refusal to proceed within its jurisdiction to perform that duty must be clear, the results of such refusal prejudicial, the remedy, if any, by appeal or writ of error utterly inadequate, and the application for relief by *mandamus* speedy and prompt."

That was emphasized anew by reference to the very few instances in which the power had been exercised in more than half a century of the court's history, in each of which instances the right involved was clear and hardship of a most serious nature to possessors of private interests was shown, for which there was no remedy at all, or none which was efficient, other than by the use of this extraordinary power. The general idea expressed is that in all ordinary cases, especially of error committed in the field of reasonable judgment and not strictly jurisdictional, parties should be left to such assistance as usual remedies afford them; that it has not been and will not and should not be the policy of this court to use its "superintending control power" to interfere with the results of litigation in inferior courts merely because, upon careful consideration thereof, it may appear that such results were wrong. Many illustrations were given to which others might be added, as for instances in *State ex rel. Brownell v. McArthur,* 13 Wis. 407; *State ex rel. Spence v. Dick,* 103 Wis. 407, 79 N. W. 421; and the two *Johnson Cases,* the errors, though judicial in character, were so palpable as not to evince any fair exercise of judgment. They were akin, at least, to usurpation, especially in the first two cases, while the magnitude of the issues jeopardized in the latter, as before indicated, was exceptional to a high degree. To the same effect are *State ex rel. Meggett v. O'Neill,* 104 Wis. 227, 80 N. W. 447; *State ex rel. Fuller v. Circuit Court,* 108 Wis. 77, 83 N. W. 1115; *State ex rel. Tewalt v. Pollard,* 112 Wis. 232, 87 N. W. 1107; *In re Mielke,* 120 Wis. 501, 503, 98 N. W. 245; *State ex rel. McGovern v. Williams, ante,* p. 1, 116 N. W. 225.

Cases involving a clear denial of a statutory right, whether by the commission of judicial or jurisdictional errors not remediable by appeal or otherwise than under the superintending control power, must be recognized as forming a class by itself. *State ex rel. Brownell v. McArthur, supra;*

State ex rel. Spence v. Dick, supra; State ex rel. Watson v. Clementson, 133 Wis. 458, 113 N. W. 667. The general policy was thus concisely stated in *State ex rel. Tewalt v. Pollard, supra:*

"This court will not exercise its jurisdiction when there is another adequate remedy, by appeal or otherwise, nor unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power."

With the foregoing in view it seems plain that the difficulties claimed to exist here come very far from involving such an emergency as the adjudications suggest to be necessary for putting the power in question in motion, notwithstanding there is no opportunity for relief by the use of ordinary remedies. The alleged error is not jurisdictional in any sense. It is not of a serious nor far-reaching character. It may well be characterized as quite insignificant. It concerns only an alleged breach of a mere police interference with private conduct, not involving moral turpitude nor inflicting, in the given case, any injury upon any one. The incident challenged, we may well assume, was but one of many affording ample opportunity for one or more prosecutions of the accused independently of the event in question. As to that the claimed infirmities in the information can probably be remedied. The validity of the law itself is not involved. A new prosecution for the same offense, even, can be commenced if sec. 4611, Stats. (1898), be valid, and it has never yet been challenged. No other pending prosecution in the same or any other jurisdiction, so far as appears, will be directly or indirectly affected by the alleged wrong decision. It is not binding and will not necessarily have any efficient influence as to other cases in any other jurisdiction. In short, it is truly of a trifling character, within the meaning of the declarations here that the court will not take cognizance under its superintending power of

such matters. To depart therefrom in this case would be to start on a policy of as free use of the superintending power as is customary in some other jurisdictions, which, as declared in the *Johnson Case*, this court is not inclined to do.

In the foregoing I am conscious of having traversed ground covered in the able opinion written for the court, but it seemed necessary in order to carry out the full purpose of this opinion, to pursue as logically as I could a history of the subject from the beginning to the crystallization of the doctrine I understand to have been heretofore and to be now substantially declared. I will close the treatment with this brief recapitulation:

(1) The second constitutional grant of power to this court, that of "general superintending control over all inferior courts," is not limited other than by the necessities of justice. It extends to judicial as well as jurisdictional errors.

(2) The necessities of justice, in a legal sense, do not reach beyond the scope of governmental policy as to righting wrongs by judicial interference; as for example, it stops in criminal cases at the constitutional prohibition of a second jeopardy.

(3) The grant of superintending control, though without specified means or instrumentalities for its exercise, includes, by necessary implication, all common-law writs and means applicable thereto and all power necessary to make such writs and means fully adaptable for the purpose.

(4) The extent of the power of superintending control, as to any particular group of circumstances, is not measurable by that of the common-law writ most adaptable in its ordinary scope to vitalize such power in regard to such circumstances. Such extent is referable to the necessities of the case and the ordinary-use feature of the writ is to be expanded to meet the exigencies thereof.

(5) The common-law writs with the power indicated to adapt them leave no part of the court's superintending con-

trol power to be necessarily dormant for want of means to vitalize it.

(6) The existence of error in the field of the controlling power does not, necessarily, upon proper request in form, require the doors of the jurisdiction to open. When that should occur rests in sound judicial discretion.

(7) By the policy of this court its superintending control power is to be exercised only when the right of the matter involved is plain, there is no other efficient remedy for its invasion or denial, such invasion or denial is prejudicial, and, generally, and especially as to errors not strictly jurisdictional, the case presents circumstances of exceptional or extraordinary hardship.

The following opinion was filed November 5, 1908:

WINSLOW, C. J. (*concurring*). When an English inferior court had for some reason dismissed a cause and application was made to the court of King's Bench to exercise its power of superintending control by the writ of *mandamus* directing the inferior court to proceed to a trial of the cause, this test was applied: Has the court refused to proceed further because it wrongly decided that some jurisdictional or other purely preliminary objection, such as lack of proper parties, prevented it from entertaining the controversy at all, or has it decided that the facts stated constitute no offense or cause of action? In the first case the writ would be issued, in the second case it would not, because in the first case the court had declined to exercise its jurisdiction to try the case, while in the second case it had exercised jurisdiction and tried the merits of the case upon an issue of law. *Reg. v. Brown*, 7 E. & B. 757; *State v. Williams, ante*, p. 1, 116 N. W. 225, and cases cited in opinion. When the present case was brought before us I thought, and still think, that it presented, not a case of dismissal upon a preliminary

question without trial, but a case where the court upon demurrer had determined the merits of the case as set forth in the information; or, in other words, had tried the case upon an issue of law. If, therefore, the English rule were to be applied, it seems to me that the writ must be denied.

I was also of opinion that the English rule should be applied, as it seemed to me that we had definitely held in the *Johnson Case* (103 Wis. 591, 79 N. W. 1081; 105 Wis. 164, 83 N. W. 320) that the constitutional grant of the power of superintending control to this court meant only such power as was exercised by the court of King's Bench. The majority of my brethren, however, hold that, even if my view of the English rule be correct (which they do not concede), still this court in the first *Johnson Case* took a much broader ground, and decided, in effect, that in a proper case this court would not only review by *mandamus* the action of an inferior court upon such a preliminary question, but would review any ruling which resulted in the practical throwing of a case out of court before trial upon evidence, which, as applied to criminal cases, would mean any ruling resulting in dismissal prior to the impaneling of a jury and the placing of the defendant in jeopardy. Upon mature reflection and with some hesitation I have yielded to this view, not because I have become convinced of error in my first conclusion, but chiefly because it has seemed to me eminently desirable that a troublesome question which has been frequently presented to us of late should be definitely and clearly settled with as great unanimity as possible.

I agree also with the conclusion reached by the court that the facts here do not present a case of such importance as should move this court to action. In the *Johnson Case* it was substantially held that the power of superintending control was not given to this court to be exercised indiscriminately in trivial or relatively unimportant causes, but only upon *sufficient* occasion. That was a case where large prop-

erty interests were at stake and the rights of many persons involved, and it was deemed that it was of such importance that this court should interfere. So in the *Williams Case, supra,* the question presented involved the validity of a large number of other prosecutions which would fail and become outlawed if the ruling of the trial court were not reversed. It is true that this limitation upon our exercise of the power of superintending control has not always been clearly recognized, but it is equally true that it must be recognized or the writ of *mandamus* will be turned practically into a writ of error by which every insignificant prosecution which for some reason is thrown out of court before trial on evidence may be brought to this court for review. The volume of business which would thus be added to the heavily burdened calendars of this court cannot be definitely estimated, but it would doubtless be great. It is not to be supposed that the constitution conferred the power of superintending control on this court to be used as a sort of an addition to the ordinary appellate jurisdiction in ordinary litigation, but rather as an extraordinary power to be wisely used only in cases where there has been a miscarriage of justice involving important public rights or great and widely extended private interests.

The following opinion was filed November 10, 1908:

DODGE, J. (*concurring*). The power of superintending control conferred on this court by our constitution is coterminous with the power vested in the court of King's Bench. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. McGovern v. Williams, ante,* p. 1, 116 N. W. 225. It extended to a review of preliminary questions needing to be decided before the court could take into consideration the merits of the controversy. *State ex rel. McGovern v. Williams, supra,* and English cases cited. The question in the *Williams Case* was whether there existed

any indictment so that the court might proceed to consider whether the accused was guilty of the asserted crime. Here the question is whether, conceding the existence of an indictment, the facts therein charged against defendant constitute guilt of the crime asserted. Such question was excluded from the superintending jurisdiction of the court of King's Bench. *Ex parte Lewis,* L. R. 21 Q. B. Div. 191; *Reg. v. Dayman,* 7 E. & B. 672; *Rex v. Justices,* 1 M. & S. 190. The review of such a question belongs within the appellate power and jurisdiction. Original jurisdiction to try the merits of a criminal charge is vested in other courts and cannot properly be conferred on, or assumed by, this court. *Seiler v. State,* 112 Wis. 293, 87 N. W. 1072. The merits include both questions of fact and law: First, did the accused perform the acts charged against him; and, if so, secondly, did he thereby commit a crime? The impossibility of designating the latter question a preliminary one is obvious, for it may be considered at any stage in the trial, as well after verdict in arrest of sentence or on motion to direct verdict as on demurrer or motion to quash before the jury is sworn. The impropriety of decision upon it by this court in the exercise of its superintending control, by *mandamus* or other writ running to the inferior court, is very obvious, because of its futility. In such a proceeding the accused is not a party, and the expression of views by this court cannot become *res adjudicata* in the action against him. Our mandate on such a writ can only command the trial court to perform its judicial duty to proceed to try the case. When that is done the circuit court owes the accused the duty to decide all questions according to his own best judgment, and the question whether the acts charged in the indictment constitute a crime is one that the defendant has a right to demand shall be decided by the circuit court honestly. He may consider our views and repudiate them. This court should never be called on to act where its decision is merely advisory. *Reg.*

v. Dayman, supra. To entertain a question on the merits and express our views upon it in the hope that the trial court would pay deference to them would be in practical effect to exert an appellate jurisdiction by subterfuge, especially where under the constitution and laws we have none. There both parties have a right that their controversy be finally settled according to the judgment of the lower court. It is a very debatable question whether the delays and other perils attending review by this court of the merits of a criminal charge when the circuit court has decided them in favor of the accused are not fraught with so much of danger to the public welfare and of oppression to individuals as to overcome any possible harm likely to result from finality of the circuit court's decision. And when the legislature resolves that question of public policy against such review, I do not think we perform our constitutional duty to the co-ordinate branch of government when we exercise review in defiance thereof professedly under the power of superintending control, when clearly that power as granted by the constitution, as always construed by this court, does not include the authority to review the merits.

For these reasons, while I concur in the judgment of the court in dismissing the writ in the present case, I cannot yield my assent to that portion of the opinion which declares that under some other circumstances we should have power to review such an order as this.

J. I. Case Threshing Machine Company, Appellant, vs. Folger and another, Respondents.

September 29—October 20, 1908.

Action, tort or contract? Agency contract: Breach: "Conversion:" Delivery of goods without requiring payment: Personal liability of agents.

1. By a contract of agency for the sale of agricultural machinery no machinery was to be delivered to purchasers except for cash or notes actually received, and it was provided that any sale in violation of that requirement should be deemed a conversion of the machinery by the agents, who should thereupon become personally liable to the principal for the full price thereof. In an action by the principal against the agents the complaint set out the contract and alleged that in violation thereof the agents sold and delivered certain machinery without its being paid or settled for in cash or notes and that plaintiff elected to treat such delivery as a conversion of the machinery by the defendants, who were personally liable therefor. *Held*, that the action was one for breach of contract, and that the "conversion" mentioned in the contract and complaint meant merely that by default of the agents the property had become theirs and they had become personally liable as stipulated in the contract.
2. Acts of the agents in such case, in leaving machinery on the highway, not in charge of any person, and notifying the purchaser, without specifying any time, to come and get it and settle for it, thus giving him an opportunity, of which he availed himself, to get the machinery without first settling for it, are *held* to have been a breach of the contract, entitling the principal to hold them personally liable for the machinery.

Appeal from a judgment of the circuit court for St. Croix county: E. W. Helms, Circuit Judge. *Reversed.*

On October 13, 1904, the parties entered into a contract in writing whereby the plaintiff appointed the defendants its agents at Baldwin, Wisconsin, for the sale of machinery, etc., for the season of 1905, terminating September 30th of that year. The agents agreed, among other things, to sell only for cash or to responsible purchasers who gave ample security for all time payments, and to sell and deliver no machinery

in any case except upon written order of the purchasers, taken upon the plaintiff's forms, to be accepted by the plaintiff at its home office, and for cash in hand or interest-bearing notes actually received, duly executed, and properly secured. Any sale in violation of these requirements was to be deemed a conversion of the goods by the agents, who should thereupon become personally liable for, and on demand account to the company in cash for, the full list price thereof, with interest from the date of delivery at the highest rate allowed by law on written contracts. In case the agents should deliver any machinery in violation of this contract the plaintiff might, in its discretion, deal directly with the purchaser, and make such settlement with him as the plaintiff should deem best, without prejudice to its claim against the agents for the full list price of said machinery and for all losses and expenses incurred by reason of such violation. The agents also agreed to be governed by the instructions printed in red ink, forming part of the contract, and to obey the same. These instructions included the following upon the subject of delivery:

"Agents subject us to greater loss by letting parties take machines before settlement than from all other causes. We prefer to make no sale rather than to let a machine go without cash or notes and securities all given before it leaves our agents' hands. We shall hold our agents strictly to their contract, and give this notice that they may be forewarned. . . . Never deliver a machine to purchaser until settled for."

The contract and instructions contained other provisions not relevant here.

Suit was brought upon a complaint averring, among other things, the making of this contract, a copy of which was annexed to the complaint and made part thereof, reciting the agreements thereof, averring an order received August 9, 1905, from one W. P. Hope for a separator, stacker, sieve, and weigher for which Hope was to pay $760 and for which he should execute his two promissory notes for the sum of

$380 each, with interest, to be secured by first mortgage on said machinery; the order directing the plaintiff to ship the said machinery to a place called Hammond, in care of the defendants, as agents for the plaintiff, for delivery to Hope upon his making settlement therefor in accordance with the terms of the order. The machinery was shipped, consigned to the defendants, and arrived at Hammond August 15, 1905, but the defendants, about seven days thereafter, "in violation of the terms and conditions of their aforesaid agency contract, and in breach of their duty to this plaintiff, and without its knowledge or consent, delivered all said machinery to said William P. Hope without requiring said Hope to pay for said machinery or to make settlement therefor by executing and delivering his notes and mortgage to this plaintiff, or to make any other settlement therefor, and said Hope took and removed said machinery without paying or making settlement therefor." A demand upon the defendants to account was averred, and this was followed by an averment that the plaintiff has elected and did thereby elect to treat the delivery of said machinery so made by said defendants in violation of their agency contract as a conversion of said machinery by said defendants, who were personally liable therefor.

The defendants, answering, denied that they ever at any time delivered all or any of said machinery to said Hope in any manner or upon any conditions whatever, and averred that, some time after the defendants had unloaded the machinery from the cars, Hope without right or authority from the defendants or either of them, and without their knowledge, took said machinery and the whole thereof.

The jury returned a special verdict finding only that the defendants did not at any time deliver the machinery covered by the contract to Hope. Upon this verdict judgment was entered in favor of the defendants, dismissing the complaint. The plaintiff appeals.

For the appellant there was a brief by *Baker & Haven,* and oral argument by *Spencer Haven.* They cited *Prince v. Alabama State Fair,* 106 Ala. 340, 28 L. R. A. 716; *Burnell v. N. Y. C. R. Co.* 45 N. Y. 184; *Fairfax v. N. Y. C. & H. R. R. Co.* 67 N. Y. 11; *Ouderkirk v. Central Nat. Bank,* 119 N. Y. 263; *Roberts v. Stuyvesant S. D. Co.* 123 N. Y. 57, 65.

E. B. Kir y, for the respondents, cited, among other authorities: *Collins v. Lowry,* 78 Wis. 329, 47 N. W. 612; *Pierce v. O'Keefe,* 11 Wis. 180; *Carroll v. Fethers,* 102 Wis. 436, 78 N. W. 604; Jaggard, Torts, 709; *Root v. Bonnema,* 22 Wis. 539; *Lander v. Bechtel,* 55 Wis. 593, 13 N. W. 483; 28 Am. & Eng. Ency. of Law (2d ed.) 686; sec. 2858*m,* Stats. (1898); ch. 346, Laws of 1907.

TIMLIN, J. The plaintiff moved to strike out the answer of the jury to the single question of the special verdict and insert in lieu thereof an affirmative answer and for judgment in its favor, and also moved for judgment notwithstanding the verdict.

The defendants contend that the action is one for conversion, and base various claims upon this proposition, all of which may be easily and accurately disposed of by ruling, as we do, that the action is one for breach of contract, and the conversion mentioned in the contract and in the complaint means merely that by the default of the agents the property has become theirs, and the liability to the plaintiff for the purchase price has been incurred as stipulated in the contract. The word "conversion" has various meanings, both popularly and in the law. A familiar rule of interpretation refuses to give any such word a fixed and unvarying meaning, regardless of the context or of the subject matter of the writing.

The plaintiff's evidence made out a case for recovery by the plaintiff. The defendants met this by the testimony of

defendant *Aune,* denying an admission alleged to have been made by him at the state fair, and by the testimony of defendant *Folger* to the effect that he telephoned from Hammond to Mr. Hope, the purchaser, telling the latter that the machinery was at Hammond and that Hope should get it and settle for it. To this Hope replied that he would come to Hammond in the afternoon of that day, but did not come. After this telephonic communication, *Folger,* with the aid of Hope's servant, Kotts, unloaded the machinery from the car and placed it on the roadside near the depot, in charge of no person, and notified Kotts to tell Hope to come and get the machinery and settle for it and not leave it standing there very long. *Folger* then went away from Hammond, leaving no person in charge of the machinery at Hammond with whom Hope could settle. Neither of the defendants lived at Hammond. Hope did in part as requested; that is to say, he did not leave the machinery standing there very long, and he sent Kotts for it and took it away, but he did not settle for it.

The defendants fixed upon no time at which they would meet Hope, at Hammond or elsewhere, to settle for the machinery. They had no one at Hammond to settle with him, and allowed Hope an indefinite time within which he could take away the machinery. *Folger* did not, by his message to Hope through Kotts, expressly make the settlement for the machinery a condition precedent to Hope's taking it away. This was a delivery to Hope within the meaning of the contract, because it was putting it in the power of Hope to take away the machinery before settling for it. It will not avail the defendants that Hope acted upon their invitation in part by taking away the machinery, but disregarded or postponed compliance with their request to settle for it. The contract in question would be practically worthless in this particular if its provisions prohibiting delivery before settlement could be evaded by leaving the machinery on the highway, not in

charge of any person, notifying the purchaser to come in at an indefinite time and get it and settle for it, thus giving him an opportunity to get it without settling for it, or to get it first and settle for it afterwards.

We must hold that upon the evidence of the defendants there was a breach of the contract in permitting a delivery of the machinery to Hope before he settled for it. It follows that the judgment of the court below must be reversed, with costs, and with instructions to that court to change the answer of the jury from a negative to an affirmative and render judgment thereon in favor of the plaintiff, as prayed for in the complaint.

By the Court.—It is so ordered.

SWEDISH AMERICAN NATIONAL BANK OF MINNEAPOLIS, Appellant, vs. KOEBERNICK and others, Respondents.

September 29—October 20, 1908.

Bills and notes: Transfer: Indorsement of nonnegotiable note by secretary of corporation: Presumption of authority: Waiver of right to substitute new notes for old ones.

1. Indorsement by the payee of his name on a nonnegotiable promise to pay, accompanied by delivery of the instrument, constitutes *prima facie* a valid transfer of the chose in action and the debt represented by it, and the purchaser may maintain action thereon.
2. The authority of the secretary of a business corporation to assign notes given to the corporation will be presumed, in the absence of proof to the contrary and notice to the assignee.
3. One who does some positive act which, according to its natural import, is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it.
4. Where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law.

5. Substitution of new notes for those originally given for machinery, under an agreement made at the time of returning a part of the machinery to the vendors, is *held* in this case to have been waived by the conduct of the makers, including their failure to demand return of the old notes or tender new ones and the subsequent making of several payments upon one of the old notes.

Appeal from a judgment of the circuit court for St. Croix county: E. W. Helms, Circuit Judge. *Reversed as to two defendants; affirmed as to the other.*

This action is brought on two promissory notes executed by the defendants to the Kenyon-Rosing Machinery Company, a corporation, hereinafter called "Machinery Company," which notes were deposited with the plaintiff as collateral security for the indebtedness due it from such corporation. In August, 1904, the defendants, or some of them, purchased from the said Machinery Company a separator, stacker, and engine, for which they agreed to pay $3,200. Notes for the entire purchase price were signed by all of the defendants and delivered to said Machinery Company, two of said notes being drawn for $125 each, two for $738 each, and two for $737 each, such notes falling due at different dates. One of the notes for $738 and another for $737 were delivered to the plaintiff, as above stated. Early in September, by agreement of the parties, the engine which was delivered was returned to the Machinery Company because it did not comply with the contract of sale, in that it was a coal burner instead of a wood and straw burner, and another engine was delivered in its stead which used wood and straw for fuel. There was testimony tending to show that, at the time the exchange of engines was agreed on, some fault was found with the separator, and that the agent of the Machinery Company stated that, if it did not work satisfactorily after the new engine was put in use, it would be taken back and that the notes given for the outfit would be surrendered. Some time after the engine was delivered fault was found with the separator and the defendants re-

fused to continue using it, claiming that it did not fulfil the terms of the contract under which it was purchased. This claim on the part of the defendants led to other negotiations, which resulted in a new agreement being made between the parties on December 6, 1904, to the effect that the separator and stacker might be returned to the Machinery Company.

There was some dispute in the testimony as to the amount of credit to which defendants should be entitled on account of the return of this part of the outfit. It was claimed on the part of the defendants that at the time the agreement for the return of the separator and stacker was made the Machinery Company through its agent agreed to surrender up and cancel the notes that were then outstanding and that new notes should be executed in lieu thereof for the purchase price of the engine. The plaintiff contended that the agreement between the parties was to the effect that the two notes aggregating $250 should be surrendered and that proportionate indorsements should be made on the remaining notes for the balance of the credit to which the defendants were entitled on account of the return of the property as stated. The notes in question were delivered to the plaintiff before the agreement in reference to the exchange of engines or the agreement in reference to the taking back of the separator and stacker was made. The defendants had no notice of the alleged transfer of the notes, but such notes are admittedly nonnegotiable.

The jury found that the Machinery Company promised to surrender and cancel the notes originally given, and on the verdict so rendered the court entered judgment dismissing the complaint. Errors are assigned because of the failure of the court to direct a verdict for the plaintiff; because of the refusal of the court to change the answers to certain questions in the special verdict; because of the refusal of the court to render judgment for the plaintiff notwithstanding the verdict; and because of rulings on evidence.

For the appellant there was a brief by *John Lind &*

A. Ueland and *Varnum & Anderson*, and oral argument by *Mr. Ueland.*

For the respondents there was a brief by *Baker & Haven*, and oral argument by *Spencer Haven.*

Barnes, J. We are met at the threshold of this case with the contention on the part of the defendants that no such transfer of the instruments sued on was made as would entitle the plaintiff to maintain an action thereon, and that therefore the judgment must be affirmed regardless of any errors committed in the trial of the cause. In support of such contention it is urged (1) that an indorsement in blank by the payee of a nonnegotiable note, accompanied by delivery, does not transfer title to the note nor to the debt evidenced by it; (2) that the indorsement on the back of the notes, "Kenyon-Rosing Machinery Company by O. G. Rosing, Secretary," was not shown to be the act of the corporation, no proof of authority to make the indorsement on the part of the secretary having been offered.

An indorsement by the payee of his name on the back of a nonnegotiable promise to pay, accompanied by delivery of the instrument, constitutes *prima facie* a valid transfer of the chose in action and the debt represented by it, and the purchaser may maintain action thereon. *Alexander v. Oneida Co.* 76 Wis. 56, 45 N. W. 21. Neither was it incumbent upon the plaintiff to prove that the secretary of the Machinery Company was authorized by the corporation to assign the notes. In *Milwaukee T. Co. v. Van Valkenburgh*, 132 Wis. 638, 645, 112 N. W. 1083, this court held that the president of a business corporation "is a usual officer as managing agent to execute such a paper as the one in question [an assignment of the note and mortgage], and it is implied in case of a transfer so signed that the officer had authority to act in the matter in the absence of proof to the contrary and notice to the person receiving the paper." What is

there said is just as applicable to the secretary of a business corporation as it is to its president. Both are general officers of such corporations who often perform interchangeably a wide range of duties. Indeed, it is a matter of common knowledge that the presidents and secretaries of ordinary private corporations perform much the same functions in the conduct of corporate business enterprises that are performed by general partners in a copartnership business. It follows that the trial court was right in holding that plaintiff had sufficient title to the notes in suit to enable it to sue and recover thereon.

There is one question involved in this case that seems to be so decisive of it as to render unnecessary the consideration in detail of the various errors relied on for reversal. The notes given by the defendants were evidence of the debt owed by them to plaintiff for the outfit originally furnished, and also for the outfit as it stood after the second engine was substituted for the one first delivered. This situation continued down to December 6, 1904, when a new agreement was reached, by which a part of the outfit was taken back and credit on account thereof was to be given to the defendants. The amount of this credit extinguished a part of the indebtedness represented by the notes. The portion of the indebtedness incurred on account of the engine which was represented therein was not canceled or wiped out in any way. It would seem to be immaterial, as far as the parties are concerned, whether proper credit should be indorsed on the old notes or they should be surrendered and new ones given for the balance due or to become due. The facts testified to in reference to the substitution of new notes for the old ones are very unsatisfactory, uncertain, and indefinite, and it is difficult to spell any contract out of them; but if any could be spelled out, which we do not decide, it must be by assuming that the parties, by implication, agreed that new notes signed by all the defendants should be given for the

reduced amount, such notes to fall due at the same time and draw the same rate of interest provided in the notes first given. The testimony showed that, after making this alleged agreement to exchange new notes for the old ones, the defendants never made any demand for the return of the old notes, and never made any offer or tender of new notes in their stead. About three weeks after the alleged agreement was arrived at, a payment of $15 was made by defendants and applied on one of the old notes. About a week later another payment of $60 was made and applied in the same way. Another payment of $25 was made on May 1, 1905, and one of $20 on September 28, 1905, and another of $80 on November 27, 1905, and still another payment of $100 was made on January 10, 1906. All of these payments were applied on one of the original notes. Under date of November 15, 1905, one of the defendants wrote the Machinery Company that they would finish the season's run soon and would collect their threshing bills and settle with the Machinery Company for the season. On December 8, 1905, one of the defendants, replying to a letter asking for a payment so as to save the trouble and expense of sending an agent to see the defendants, answered that it was their aim to send what money they could so as to save expense to the Machinery Company, and that they would send $50 the latter part of the following week. December 25, 1905, a letter was sent to the Machinery Company, which was signed *"Emil Koebernick,* by *Carl Koebernick,"* which, among other things, stated:

"What was due to pay on the engine on last year's note we will pay this fall as agreed with your Mr. Johnson. Please send the engine note of last year to Clear Lake, and I will call there and settle for it."

On December 27, 1905, a letter was written to the defendant *Emil* by the Aultman Engine & Thresher Company, the holder of one of the original notes, stating definitely and ex-

plicitly the terms of the agreement of December 6, 1904, as claimed by the agent of the Machinery Company. It is true this letter was excluded from evidence, but it is none the less true that it was entirely competent in view of what subsequently took place. Within less than two weeks after this letter would be received in the ordinary course of mail, fully advising the defendants as to the amount claimed to be due on their outstanding notes on account of the engine, the defendants made their last payment of $100. In an action brought by the Aultman Engine & Thresher Company against the defendants on the note upon which the foregoing payments were made, the defendants *Carl* and *Augusta* answered, setting up the fact that they signed the note merely as sureties and that they were discharged by reason of the time of payment of the note having been extended without their consent. No claim was asserted that liability on the note in suit was avoided by reason of an agreement to substitute another note in its stead.

When it is considered that the parties could not have attached much importance to the mere formal matter of the giving of new notes, rather than making indorsements on ones then in existence, so that the old ones stood for just what the new ones would represent, we cannot escape the conclusion that the defendants abandoned and waived the substitution of new notes for the old ones, assuming the agreement to have been as found by the jury.

A waiver is the intentional relinquishment of a known right. *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 22, 85 N. W. 685. A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dis-

pensed with, will be deemed to have waived it. 29 Am. & Eng. Ency. of Law (2d ed.) 1103, and cases cited. And, where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law. *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 523, 524, 90 N. W. 476; *Fox v. Harding*, 7 Cush. 516, 520.

From the conclusion reached it would logically follow that the judgment should be reversed and the cause remanded with direction to enter judgment on the notes for a stated sum, were it not for an apparent dispute in testimony as to the amount of credit defendants should receive on account of the separator and stacker. The great preponderance of the testimony is to the effect that such allowance should be $1,150, the price at which these articles were figured in the original purchase, and appellant's counsel seem to concede in their brief that credit to this amount should be given. The agent of the Machinery Company, however, testified that he did not agree to allow this amount, and as a matter of fact it was not allowed by way of payment of or indorsement on the notes. There is no dispute about two notes for $125 each, dated August 24, 1904, having been surrendered and canceled at the time the agreement of December 6th was made. One of these notes fell due October 1, 1904, and the other would mature October 1, 1905. These notes apparently drew interest at seven per cent. per annum until maturity and ten per cent. thereafter, although this fact appears by inference rather than by any direct testimony bearing on the subject. The evidence as to the amount due on these notes December 6, 1904, is too unsatisfactory to warrant this court in endeavoring to compute the portion of the $1,150 credit that was absorbed by them, even if it were apparent that the total credit should be that amount. One half the balance of the credit left after paying the two $125 notes should be applied upon the notes in suit as of December 6, 1904. If the sum of $1,150 is the proper credit, it is a mere matter of

computation to make the proper indorsement on the notes in suit after the conditions as to interest on the two $125 notes are ascertained.

By the Court.—Judgment reversed as to the defendants *Emil Koebernick* and *Carl Koebernick,* and the cause is remanded for a new trial upon the question of the amount that should be credited the defendants on the notes in suit on account of the contract of December 6, 1904. The plaintiff may, within thirty days from the date of the filing of the mandate of this court with the clerk of the circuit court for St. Croix county, elect to take judgment against the defendants *Carl Koebernick* and *Emil Koebernick* for the amount due on said notes after crediting thereon the amounts to which said defendants would be entitled to credit as of December 6, 1904, on the basis of an allowance of $1,150 for the machinery returned. The judgment as to *Augusta Koebernick* is affirmed. Costs in this court are awarded to appellant.

TWENTIETH CENTURY COMPANY, Appellant, vs. QUILLING, Respondent.

September 29—October 20, 1908.

Appeal: Harmless errors: Disregarding stipulation as to trial: Law of the case: Decision on prior appeal: Special verdict: Form: Waiver of objections: Principal and agent: Ratification: Making of contract: Evidence: Probability: Unreasonableness: Experts: Qualifications: Evidence as to intent: Instructions to jury.

1. Refusal to try a case without a jury in accordance with a stipulation under which a former trial was had was not harmful error where, after taking the verdict of a jury, the court made and filed full findings of fact in harmony with the verdict, thus adding its decision to that of the jury.
2. An appellate court will not interfere with the action of a trial court in setting aside or disregarding a stipulation in respect

to the conduct of a trial, in the absence of satisfactory affirmative proof that some right of appellant was prejudiced thereby.

3. A decision on a prior appeal that the facts alleged in the answer, if established, would entitle defendant to judgment, is the law of the case upon a subsequent trial and appeal.

4. Where a special verdict covers in some reasonable form all material controverted issues of fact, the fact that some questions therein are immaterial and that others do not, each by itself, cover a distinct issue, is not prejudicial.

5. Where at the trial counsel object to the form of the special verdict in one particular only, they will be deemed to have waived other objection to such form.

6. Where a principal, with full knowledge of all material facts, retains the fruits of an illegal contract made by an agent and attempts to enforce a note given as a part thereof, he thereby, as a matter of law, ratifies the act of the agent.

7. The question being whether the note in suit was given, as plaintiff claimed, for a county right to sell a patented article, or in pursuance of an illegal scheme of the parties to defraud other persons by selling to them nominal and practically worthless territorial rights to sell such article, evidence offered by defendant that there were at the time other devices similar to the one in question with which the latter would come in competition, so that purchasers of selling rights would not have the advantages of a monopoly, was admissible, whether such other devices were patented or not, as tending to show that such a contract as plaintiff claimed was made was unreasonable and the making thereof improbable.

8. A failure to show what were the relative merits of such devices went to the weight of such evidence, not to its competency.

9. A witness who testified that he personally knew of several devices designed to accomplish the same result as the patented article in question, had observed them in use for quite a period of time, and had kept them for sale in his hardware business and sold them when traveling, was competent to testify as to the similarity of the other devices to the one in question.

10. A witness who had had several years' experience as a wagon and carriage maker and in such business had seen five or six pole and thill coupling devices of the nature of the one in question and had observed some or all of them in use, was competent to testify as to the practicality of one of such devices and to testify as to what the devices shown him were designed for.

11. Direct evidence of a party's intent in making a contract is admissible where such intent is material and is not manifest from the contract itself; and when the intent is so manifest the ad-

mission of direct evidence in harmony therewith is not prejudicial.

12. Where a witness was permitted to testify fully as to what was said and done between a principal and his agent respecting a certain matter, it was not error to refuse to permit him to state his conclusion as to the limitation of the agent's authority in the matter.
13. Where the principal has adopted and ratified an act of his agent, the exclusion of evidence as to limitations of the agent's authority to do such act is not prejudicial.
14. Rulings of the trial court as to the admission or exclusion of evidence should not be assigned as error unless they relate to something of a substantial nature and may probably have affected the result prejudicially to the party so assigning them.
15. A mere explanatory sentence in the charge or in an instruction to the jury should not be separated from its context and error assigned; but the charge or instruction should be regarded as a whole and as the jury must have understood it.
16. Where a special verdict is taken, requested instructions which are not directed to any particular question may properly be refused.
17. Requested instructions on the subject of the ratification of an agent's act were properly refused where the evidence showed ratification as a matter of law.
18. Rejection of requested instructions, to the effect that the intent of one party in making a contract is immaterial without a similar intent on the part of the other, was not error, where the question of the special verdict covering that issue and the instructions given with respect thereto were such that the jury could not find thereon favorably to respondent without finding that there was a meeting of the minds of the parties as to the matter.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Affirmed.*

Action to recover on a promissory note. The defense was as tendered in the proposed amended answer, fully set forth in the report on the first appeal to this court. 130 Wis. 318, 110 N. W. 174. For a full statement of the issues presented reference is here made to such report, it being understood that such proposed amended answer was the answer in fact at the second trial, resulting in the judgment appealed from.

The first trial was by the court pursuant to a stipulation that the cause should be placed upon the court calendar and tried at the convenience of the court upon notice by it to the attorneys for the respective parties.

The judge who presided at the first trial did not preside at the second. On the latter occasion, the cause being on the jury calendar and having been reached for trial, plaintiff's counsel moved on the aforesaid stipulation for a transfer of the cause to the court calendar and a trial without a jury. The motion was denied, due exception to the ruling being preserved. Evidence was introduced bearing on the questions passed upon by the jury. A special verdict was rendered containing these findings in substance: The purpose of both parties to the contract was to defraud others. The real arrangement between them was a mutual scheme to make money by selling nominal territorial rights to others, each of whom should, by the sale contract, become a party to the scheme, agreeing to sell similar rights to others, each of whom should likewise sell to still others, and so on to the extent that purchasers could be found who would become like parties. Such arrangement was the real consideration for the note in suit. Neither party supposed the right to sell the device in Gates county was of any real commercial value, or that defendant would make any effort in that regard. Such right was not of any real commercial value. The written contract did not include the entire agreement. It was agreed when the contract was made and note given that the right to sell the patented article in Gates county during the life of the patent was of no value. The agent who represented the defendant in the transaction was authorized to make the agreement. Such agent had authority additional to that indicated in the writing between him and plaintiff.

After the rendition of the verdict a motion was made on behalf of plaintiff for judgment thereon, and a motion was made on behalf of defendant to change the answers which

were adverse to it to answers in its favor and for judgment on the corrected verdict for the amount claimed in the complaint. Subsequently the court made and filed full findings of fact, substantially the same as would have been required in case of the trial having been had without a jury, denied plaintiff's motion, and granted that of defendant. Judgment was rendered accordingly dismissing the cause with costs.

Daniel H. Grady, for the appellant.

For the respondent there was a brief by *Bundy & Varnum,* and oral argument by *R. E. Bundy.*

MARSHALL, J. Whether, technically, the court erred in refusing to try the case without a jury, and we do not intend to suggest that it did so err, such error was not harmful. The defendant was entitled as matter of right to a jury trial unless he waived it. The court, seemingly uncertain as to whether he ruled right or not in denying the motion to try the case in accordance with the stipulation, after taking the verdict made full findings of fact, adding its decision to that of the jury, the two being in harmony. In such circumstances we are unable to see that plaintiff was in any wise prejudiced by the ruling complained of. The general trend of authority is that an appellate court will not interfere with the action of a trial court in setting aside or disregarding a stipulation in respect to the conduct of a trial, in the absence of satisfactory affirmative proof that some right of appellant was prejudiced thereby. 20 Ency. Pl. & Pr. 670, and cases cited. That is the effect of *Brown v. Cohn,* 88 Wis. 627, 60 N. W. 826.

The law of this case, respecting whether respondent was entitled to judgment in the event of his establishing without harmful error in the course of the trial the facts alleged in the answer, was settled upon the first appeal. Some questions in that field are presented in the brief of appellant's

counsel, but we shall not refer thereto otherwise than by this recognition of them and the well-known rule that they are settled by the former decision. *Case v. Hoffman,* 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087; *Zimmer v. Fox River Valley E. R. Co.* 123 Wis. 643, 645, 101 N. W. 1099; *Horn v. La Crosse Box Co.* 131 Wis. 384, 388, 111 N. W. 522.

While some fault is found with the special verdict no complaint goes to the extent of challenging its sufficiency as not covering all controverted issues of fact. Such being the case, the fact, if there be such as claimed, that some questions included in the verdict are immaterial and others do not, each by itself, cover a distinct issue raised by the pleadings, is nonprejudicial. It were better to always prepare the special verdict in strict conformity to the statute as the court has construed it. But if in any case the verdict in some reasonable form covers all material facts put in issue by the pleadings and controverted in the evidence, so that each question and the answer thereto informs the court as to the truth of the controversy involved therein, especially in case of there being no objection to the form till after the jury are discharged, another rule of the statutes—the one commanding a disregard of nonprejudicial errors—must prevail. No objection to the form of the verdict here was raised by appellant's counsel upon the trial except one not mentioned upon this appeal. The fact that counsel examined the form prepared by the court and made the one objection thereto directed to one question, keeping silent in respect to it otherwise, may well have been understood by the court as consenting to such form, except as thus criticised. Nothing further seems necessary on this branch of the case.

Much complaint is made that the verdict, at some material points, is not supported by any credible evidence. The record has been carefully studied in that respect. We shall

not follow in this opinion the intricacies of counsel's argument as to what is essential to a contract embodying the fatal elements set forth in the answer. Many questions discussed in counsel's brief in respect to such matters, bearing on the greater question that the verdict is not supported by the evidence, are beside the case, as we view it. Did the plaintiff and defendant make the contract alleged in the answer? That is the vital question, and it was resolved by the jury in respondent's favor by a distinct finding on the subject.

True, appellant acted in the matter through an agent, but there is no question of ratification necessarily involved, since the jury found that the agent had original authority to act as he did. Moreover, we agree with the contention of respondent's counsel that the act of appellant in keeping the fruits of the alleged and found illegal transaction and pursuing respondent to realize thereon after being fully informed of the nature thereof, as it seems was the case, was a ratification of the agent's conduct as a matter of law. *McDermott v. Jackson,* 97 Wis. 64, 76, 72 N. W. 375; *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476. In the last case cited it was stated as a principle too well understood to justify discussing the same in a legal opinion, that a person cannot have the benefit of a transaction and repudiate the responsibilities thereof. If he insists upon the one he subjects himself to the other as regards civil remedies. Standard works on the law of principal and agent uniformly so state the rule to be, as witness the following:

"The principal cannot avail himself of the benefits of the act of a person assuming to represent him in a transaction and repudiate its obligations. Having, with full knowledge of all the material facts, ratified, either expressly or impliedly, the act assumed to be done in his behalf, he thenceforward stands responsible for the whole of it to the full extent to which the agent assumed to act, and he must abide by it whether the act be a contract or a tort and whether it results to his advantage or detriment." Mechem, Agency, § 167.

Without further discussion on this branch of the case we will close by stating this as the conclusion to which we have arrived: There is ample evidence tending to establish every material fact covered by the verdict. To incumber this opinion by a recital of the evidence in detail, or even by stating the same in a general way with an analysis thereof, pointing out how the jury might reasonably have viewed the same, would serve no purpose except to support the statement that the record has been carefully examined as a basis for the conclusion. We must assume that no such support is necessary.

Many complaints are made of rulings on evidence. We will refer in detail to those which we regard as most significant.

Evidence was permitted on the part of defendant as to there being devices similar in character to the one in question with which the latter, at the time the contract was made, would, upon its being placed on the market, come in competition. It is suggested that the evidence should not have been allowed in the absence of proof that such other devices were patented. We are unable to see why that could make any difference. The materiality of the evidence was in its tendency to prove the circumstance that the particular device was but one of several designed for the same purpose; that being regarded as throwing some light on whether the contract actually made was as claimed by respondent. In that respect the evidence was competent. It is said that the evidence was not limited to the time and place involved in the contract. As we read the evidence it clearly related to the time of the contract and theretofore and was general, including the place where the contract was made. The material thing, as indicated, was to show that in any effort to sell the patented device one would not have the advantages of a monopoly and that under such circumstances and others shown by the evidence such a contract as appellant claimed

was made would be unreasonable and, therefore, the making thereof was improbable.

It is further suggested that in no case where a witness testified on the subject of there being other appliances on the market was it shown that he was competent to testify as to relative merits. No place is pointed out by counsel where any witness testified in relation to relative merits. Counsel for respondent seems to have been content with proving the evidentiary circumstance that the particular device was but one of many. So far as the evidence was weak in not showing relative merits it went to the weight of the evidence, not to the competency thereof.

Particular complaint is made because the court permitted one Jackson to testify on the subject of the existence of other appliances than the one in question without, as alleged, having shown himself to be experienced in respect to the matter. As we read the evidence counsel is in error. It shows that the witness personally knew of several devices designed to accomplish the same result as the particular one. He had observed them in use for quite a period of time and kept them for sale in his business as a hardware dealer and sold them when traveling as a sales agent.

Error is assigned because the court permitted a witness to testify that a particular device shown him designed for the same purpose as the one in question was practical. It is argued that the witness was not shown to have any special knowledge on the subject. The record clearly indicates to us otherwise. The witness seems to have had several years' experience as a wagon and carriage maker, and dealer, and in such business to have, prior to the making of the contract, seen some five or six devices of the nature of the one in question and observed some or all of them in use. In short, the witness's competency to a high degree was shown. It is argued that it was improper for the witness to testify as to the design of devices shown him; that such was opinion evidence

and invaded the province of the jury. No reason is perceived why it was not perfectly proper for such an experienced witness to merely testify to what appliances exhibited to him were designed for. If it was a matter open to any one of common knowledge the evidence was harmless. If it was within the field of expert evidence the witness was abundantly competent. At this point it is again suggested that the witness's evidence as to the use of thill couplings was not limited to the time and place of the contract. We find that it was very carefully so limited as to time and related to the territory in which the contract was made.

Further complaint is made because respondent was permitted to give direct evidence as to his purpose in making the contract. It is suggested that his intent by itself was immaterial, the mutual intent only being important; that an undisclosed intent in any event cannot be testified to for the purpose of contradicting or nullifying express and definite words of a contract, and that the intent was only provable by the acts and language of the parties. It is a sufficient answer to counsel's entire argument at this point that the evidence was nonprejudicial because the intent in making the contract, if the character of the agreement was as he claimed, was manifest. Moreover, the admission of the evidence was not upon the theory, nor did it give rise reasonably to a suspicion, that the intent of the defendant, by itself, was material, nor did the evidence tend to contradict, but rather it was in perfect harmony with the words of, the contract as respondent claimed it was made. Again, counsel is in error in the position that direct evidence of intent, when that element is material, is not permissible. It is proper in many situations. *Anderson v. Wehe,* 62 Wis. 401, 22 N. W. 584; *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297, 303, 304, 58 N. W. 391; *Fischer v. State,* 101 Wis. 23, 26, 76 N. W. 594. When the act in question is ambiguous as regards the intent, direct evidence is always proper. When the in-

tent is manifest from the contract and in harmony with the intent testified to, the evidence is immaterial, but harmless. When the intent is so manifest it is error to admit direct evidence impeaching it. The subject is summarized in Jones, Ev. at sec. 170 (167), in harmony with the decisions of this and other courts substantially thus:

"It is the prevailing rule, sustained by the great weight of authority, that . . . when the motives of the witness in performing a particular act become a material issue in a cause or reflect important light upon such issue, he may himself be sworn in regard to it, . . . though testimony of this character should not be received to change the import of a contract, as to the terms of which there is no dispute, or to vary a written instrument."

Reliance is placed on the fact that the court permitted evidence of transactions subsequent to the making of the contract. Whether, if that were true, it was proper or not under the circumstances need not be considered, since we are unable to find that any such evidence was given. As we view the matter, counsel is plainly in error as to the time when the contract was finally concluded and the complaint at this point is predicated on such error.

The court erred, it is said, in rejecting proof as to the limitation of the authority of the agent who acted in appellant's behalf in making the contract. The record discloses that the witness whose testimony is referred to, while not permitted to give evidence of his conclusion, was allowed to testify fully respecting what was said and done between the agent and the principal respecting the matter. Moreover, rulings on that line, whether correct or not, were nonprejudicial, since the case shows that appellant adopted the act of the agent as before indicated.

There are several more rulings complained of excluding or admitting evidence, but they are not considered of sufficient importance to warrant further detail mention thereof.

It may be well to observe that rulings of the character just discussed, unless they relate to something of a substantial nature and are clearly wrong and may probably have affected the result prejudicially to the adverse party, fall under the statutory rule respecting disturbance of a final adjudication because of nonprejudicial matter. Therefore the presentation of a multitude of such rulings for review upon appeal, without careful discrimination between those which may be worthy of consideration and those which are not, is far from being advisable. It takes up the time of the court and counsel which could profitably be devoted to matters which are vital. Instances are few in number where such rulings have been found to be of sufficient importance to have probably affected the result.

It is claimed the court instructed the jury that there was in fact an oral agreement made between the parties contemporaneous with and in addition to the written contract, thereby invading their province respecting the vital issue in the case. That claim is grounded on what appears to be an erroneous report of the charge; a mere explanatory sentence being reported as an independent expression. We have no doubt from the language objected to and its context that the whole was read to the jury in such a way as to unmistakably convey to them a single thought, leaving the controversy involved to them for determination. The charge as we apprehend it was given, and as seems manifest, is as follows:

"The defendant here claims that there was an oral understanding and agreement outside the written contract, and that is for you to determine by your answer to the question whether that is a fact or not; I mean to say, that there was an oral understanding or agreement made at the same time and contemporaneous with the written agreement. It is that understanding or agreement that I refer to that the defendant contends was made at the same time with the written contract, and by your answer to this question you are called upon to determine whether or not that is a fact."

The clause commencing with the words "I mean to say," plainly refers to what preceded by way of explanation, for the purpose of impressing upon the minds of the jurors more definitely the real issue to be determined. That is rendered doubly plain by the sentence which follows. By separating the intervening clause, as counsel does, from the words which precede it, plain error is exhibited, but the clause is thus made so inconsistent with the language which follows it as to make the claim that it was used as counsel contends and as it was punctuated by the reporter, quite unreasonable. The jury must have gotten this idea and none other: You are to determine by your answer to this question whether that is the fact or not, viz.: that there was an oral understanding or agreement made at the time and contemporaneous with the written agreement.

Some requests to instruct the jury made by counsel for appellant on the subject of ratification were rejected. In some instances the requests were rejected properly because they were not directed to any particular question. All were properly rejected because the evidence showed ratification as a matter of law, and in any event the rejection was harmless because the jury found as matter of fact on evidence warranting it that the contract was made between plaintiff and defendant at the outset as testified to by the former.

Complaint is made because the court rejected an instruction to the effect that the intent of one party in making the contract is immaterial without a similar intent on the part of the other and that the affirmative of question 9, covering the issue as to what the contract in fact was, depended on whether the jury concluded from a preponderance of the evidence that both parties intended to make such an agreement as that contemplated by the question. The difficulty at this point is that the question did not deal with the subject of intent as a fact, but with the subject of what the contract was which the parties made as disclosed by the writing and their

verbal communications. If they said and did what respondent claims, then they made the contract alleged. To hold that they did not would be to contradict unmistakable language and acts. So the intent as an independent substantive fact was immaterial, though as before indicated, so far as it was testified to directly, the evidence was, if immaterial, not harmful. The question and instructions given in respect thereto made it impossible for the jury to pass upon the controversy favorably to respondent without finding that there was a meeting of minds in respect to the matter.

A further suggestion is made that the court improperly permitted the jury in answering the question last above mentioned to find that there was an oral contract made subsequent to the making of the written contract and the giving of the note sued on. Here again counsel points to a sentence apart from its context which is clearly explanatory of what precedes it. That is manifestly an improper way to test a court's instructions. By such methods one might easily read error out of language which is, when properly considered, absolutely faultless. When the instruction here is considered as a whole, the particular part unmistakably refers to the claim that the written contract was but part execution of an entire oral one made at the time the writing was executed. We may well repeat what has often been said before, that a charge must be regarded as a whole and as the jury must have understood it and not divided up into its separate sentences and clauses. *Bartell v. State,* 106 Wis. 342, 82 N. W. 142; *Pelton v. Spider Lake S. & L. Co.* 132 Wis. 219, 235, 112 N. W. 29.

Some other matters are presented by counsel for appellant but none which seem to call for special treatment. All complaints not here mentioned in detail have been considered and passed upon, resulting in a conclusion that the judgment must be affirmed.

By the Court.—So ordered.

CHANDLER LUMBER COMPANY, Appellant, vs. RADKE, Respondent.

September 30—October 20, 1908.

Sales: Construction of contract: "Free on board cars:" Principal and surety: Discharge of guarantor: Departure from contract: Materiality.

1. A contract to deliver lumber "free on board cars" at its destination means that it is to be delivered on board cars at that place, free to be taken by the purchaser without any obstruction, burden, or impediment; and it is not so delivered when, in order to take it into his possession, he must discharge a lien thereon for freight.
2. A surety has the right to determine and specify the exact conditions upon which he will be responsible for the debt of another, and an expression in the contract apparently declaring a condition of such liability will not be ignored unless the court can say with certainty that it is immaterial and that departure therefrom is without prejudice.
3. One who guaranteed payment for lumber to be delivered "free on board cars" at its destination, with sixty days' credit, to a contractor almost wholly without means of his own, was discharged from liability by the vendor's requiring the vendee to pay the freight (amounting to seven per cent. of the price) before he could take the lumber, although such payment was credited on the purchase price. KERWIN, TIMLIN, and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Plaintiff, lumber dealer in Chicago, on July 17, 1906, had agreed upon a sale of two bills of lumber, specified in detail for two houses, for which one H. Schutte, a builder, had taken contract, amounting to $2,160, and before shipment thereof the defendant executed a guaranty in part as follows:

"I guarantee the payment of the above amount to you for lumber and building material purchased of you by Mr. H. Schutte to be delivered free on board cars, Madison, Wis., as per your estimates number 2113 and 2134 dated July 8th

and 17th, 1906; payment to be made within sixty days after date of invoice, provided same is found as specified in your estimates above referred to."

Schutte was without capital, but had worked for defendant, who had confidence in him. Plaintiff promptly commenced shipping such lumber in carload lots; said cars being shipped so that it was to be delivered to Schutte only upon his payment of the freight, for which he was allowed credit by the plaintiff. Afterward Schutte, having obtained other contracts, commenced ordering the lumber therefor also from the plaintiff, and thereafter carload shipments were made containing both the lumber on the first two estimates guaranteed by defendant and on other orders. The latter part of October Schutte absconded. The plaintiff's representative, who had made the sales and had full charge of the dealings and collections from Schutte, came to Madison, found a quantity of lumber stored by Schutte in a vacant building, and seized and returned the same to Chicago. This action was brought to recover from the defendant the entire sum of the first two estimates, $2,160.

The defenses were, first, that by shipping to Schutte subject to the freight bills, whereby he had been compelled to pay sums amounting to over $150 before he could obtain the lumber, the plaintiff had materially departed from and modified the contract and discharged the guarantor; second, that by the seizure and recaption of a part of the lumber which had been delivered under this guaranty plaintiff had deprived Schutte and the defendant of the benefit which would have resulted from completed performance of the contract, and therefore discharged the defendant as guarantor. Also that plaintiff had received as payment upon said guaranteed debt the $1,500, the freight advances of $153, and the value of the lumber so reclaimed after Schutte's disappearance.

The action was tried to a jury and a special verdict rendered to the following effect: (1) That plaintiff did not in-

form the defendant of any custom that the purchaser should pay and have credit for freight on lumber shipped f. o. b. Madison; (2) that plaintiff did apply $1,500 payment upon the two estimates guaranteed by the defendant; (3) that the value of the lumber from the guaranteed shipments which plaintiff took back was $150; (4) that defendant did not consent that such lumber be taken. This verdict was assailed by all necessary motions to raise the questions discussed on this appeal, but the court held thereon that, by imposition of the conceded burden of freight before the lumber could be received by Schutte from the railroad company, the contract had been materially modified and defendant discharged from his guaranty; also that by the recaption of lumber which had been delivered and was needed to build the buildings specified in the estimates, the contract had been modified to the hurt of the defendant and he discharged. Accordingly judgment was rendered for the defendant, from which the plaintiff appeals.

For the appellant there were briefs by *Bashford, Aylward & Spensley,* and oral argument by *R. M. Bashford.*

For the respondent there was a brief by *Gilbert, Jackson & Ela,* and oral argument by *Russell Jackson.*

The following opinion was filed October 20, 1908:

Dodge, J. Error is assigned upon the holding of the trial court that the shipping of the lumber so that the purchaser, Schutte, could not obtain it at Madison except by paying the freight charges thereon was a departure from the terms of the contract, and evidence was offered to prove a custom to so ship lumber even under a contract for its delivery free on board at its place of destination. The court's ruling in this respect must be approved. The expression "free on board" in a contract like this is not ambiguous and therefore not open to construction either by proof of custom or otherwise. *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820;

Fromme v. O'Donnell, 124 Wis. 529, 532, 103 N. W. 3. "Free on board cars, Madison," means that the plaintiff, in order to perform its contract, must deliver the lumber on board cars at Madison, Wisconsin, free to be taken by the purchaser without any obstruction, burden, or impediment. It is not so delivered when, in order to take it into his possession, he must discharge a lien thereon for freight.

But appellant further contends that, even though this were a departure from the terms of the contract, the surety is not thereby discharged, for that the variation was not prejudicial to him, since Schutte received credit for the amount of freight which he paid and thereby reduced the indebtedness for which the defendant as surety was liable. It is elementary that a surety is favored in the law. As he ordinarily does not receive the benefit of the contract, but is a mere volunteer, he has a right to define exactly the conditions upon which he shall be responsible for the debt of another, and only upon compliance with those conditions can he be held to such liability. 1 Brandt, Suretyship (3d ed.) § 427; *W. W. Kimball Co. v. Baker,* 62 Wis. 526, 22 N. W. 730; *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737; *Cowdery v. Hahn,* 105 Wis. 455, 81 N. W. 882; *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, 85 N. W. 648; *Omaha Nat. Bank v. Johnson,* 111 Wis. 372, 87 N. W. 237; *Charley v. Potthoff,* 118 Wis. 258, 265, 95 N. W. 124. While this rule was originally enforced with entire strictness, it is now subject to certain exceptions, among which the only one claimed to be relevant to the present situation is set forth in *Stephens v. Elver, supra,* namely, if the variation appear to be wholly immaterial and without prejudice to the surety's rights it will be ignored. Of course the principle remains that the surety may determine and specify the exact terms upon which he will be liable and has a right to stand upon those terms, and it is only when a court is able to say with certainty that an expression in the contract apparently de-

claring a condition of such liability is so immaterial to him and departure therefrom so necessarily without prejudice that it cannot believe in an intention of the parties to express it as a condition of liability does the above noted exception apply. In the instant case, while the reduction of Schutte's indebtedness by the amount of the freight probably would be beneficial rather than injurious to the defendant under most circumstances, yet, when we remember that it was made to appear that Schutte was engaging in the business of a building contractor almost wholly without means of his own, and his ability to pay for the materials and labor in any given piece of work depended upon his completion thereof and consequent receipt of the contract price, which, as we know, is usually in large part withheld pending such completion, it becomes apparent that any obstacle placed in the way of speedy completion enhanced the danger of his becoming involved by pressing indebtedness and the interruption of his work by creditors. It cannot be doubted, therefore, that the provision for sixty days' credit upon the lumber which entered into these two building contracts, amounting to about $2,000, was of the greatest importance in promoting the probability of his success and consequent ability to meet debts. To that end, even a small amount of cash might be very important, and the deprivation thereof seriously prejudicial. The $150 which he was obliged to pay in cash in order to obtain these materials might well have enabled the hiring of labor or the purchase of such materials as he could not obtain upon credit and which were necessary to the completion of the work. We are therefore brought to substantial agreement with the trial court on the proposition that the requirement that Schutte pay about seven per cent. of the price of this lumber in cash instead of upon a credit of sixty days was a departure from the terms of the contract which we cannot say with any degree of certainty was immaterial or without prejudice to the surety.

If Schutte, as appears to have been the case, assented to this modification, the contract was changed without the consent or approval of the surety. If he did not consent, the plaintiff has failed in the performance of its contract in a respect material to the surety's promise, which in either case is not enforceable. *W. W. Kimball Co. v. Baker,* 62 Wis. 526, 531, 22 N. W. 730; *Charley v. Potthoff, supra; Walrath v. Thompson,* 6 Hill, 540.

As this conclusion must result in affirmance of the judgment, no discussion of the sufficiency of the other grounds upon which it rests need be indulged.

By the Court.—Judgment affirmed.

The following opinion was filed November 11, 1908:

Kerwin, J. (*dissenting*). I cannot agree with the majority opinion that the payment of freight changed the contract in any material particular. The amount of freight paid was simply an advancement of a portion of the purchase price before the same became due, and was credited upon the contract. While Schutte was not required to pay any portion of the purchase price before due, still the payment of the freight, which was credited upon the purchase price and decreased to that extent the obligation of the surety, cannot, in my opinion, be held a material alteration of the contract, unless it can be said to have prejudiced the surety. There is nothing in the record tending in the least to show that it did, and therefore I cannot see that such payment discharged the surety. *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737; *Madison v. Am. S. E. Co.* 118 Wis. 480, 95 N. W. 1097; *Grafton v. Hinkley,* 111 Wis. 46, 86 N. W. 859, and cases there cited; *Rice v. Filene,* 6 Allen, 230; *Groendyke v. Musgrave,* 123 Iowa, 535, 99 N. W. 144; *Feustmann v. Estate of Gott,* 65 Mich. 592, 32 N. W. 869; Stearns, Suretyship, § 72; 1 Brandt, Suretyship (3d ed.) §§ 428, 445.

The sixty days' credit upon the whole amount of the purchase was in this case for the benefit of Schutte, and the waiver of it to the extent of the amount of freight advanced did not prejudice the surety, as appears from the record; and, this being so, there was no material alteration of the contract. I do not think the case before us is one where the principals to the contract, without the consent of the surety, changed the terms of the credit to the prejudice of the surety in the sense of the cases laying down that rule. Nor do I think there was any breach of the contract, but, even if there was a technical breach, it was without prejudice to the surety, and therefore wholly immaterial.

I think the judgment below should be reversed.

TIMLIN and MARSHALL, JJ. We concur in the foregoing dissenting opinion of Mr. Justice KERWIN.

GRENAWALT, Respondent, vs. ROE and another, Appellants.

September 30—October 20, 1908.

Sales: Executory contract: Refusal to accept goods: Performance: Burden of proof.

Writings executed in August to the effect that plaintiff had sold to defendants his crop of tobacco for that year, consisting of a certain number of acres, to be delivered about the next January in certain prescribed forms and in good packing condition, are *held* to have constituted an executory contract, not a sale *in præsenti;* and in an action for breach thereof by refusal to accept the tobacco the burden of proof was upon the plaintiff to show substantial compliance on his part by offer of delivery of the tobacco in the forms and in the condition specified.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Clancey & Loverud,* and oral argument by *J. M. Clancey.* They cited, besides other cases, *Warren v. Bean,* 6 Wis. 120; *Olson v. Mayer,* 56 Wis. 551, 14 N. W. 640; *Keller v. Oberreich,* 67 Wis. 282, 30 N. W. 524; Benjamin, Sales, §§ 600, 895; 6 Am. & Eng. Ency. of Law (2d ed.) 451; 24 Am. & Eng. Ency. of Law (2d ed.) 1114; *Hoffman v. King,* 58 Wis. 314, 17 N. W. 136; 19 Ency. Pl. & Pr. 63, and cases; Blashfield, Instr. to Juries, § 347.

J. J. Cunningham, for the respondent, cited, among other authorities, *Locke v. Williamson,* 40 Wis. 377; *Jacobson v. Tallard,* 116 Wis. 662, 93 N. W. 841; Jones, Ev. 178; *Redman v. Ætna Ins. Co.* 49 Wis. 431, 4 N. W. 591; Hughes, Instr. to Juries, § 410; *Schobacher v. Germantown F. Mut. Ins. Co.* 59 Wis. 86, 17 N. W. 969; *Benedix v. German Ins. Co.* 78 Wis. 77, 47 N. W. 176; *Chicago, M. & St. P. R. Co. v. Hoyt,* 149 U. S. 1, 13 Sup. Ct. 779.

Timlin, J. On August 25, 1906, the plaintiff, a farmer, sold to the defendants, tobacco dealers, by written contract, his crop of four and one-half acres of tobacco then on the field and partly harvested. The written contract is as follows:

"No. 22. 8-25-1906.

"This certifies that I have bought of *Roy Grenawalt* crop of 1906 tobacco consisting of four and one-half acres for account of Roe & Brickson. Wrappers and binders in bundles at 14 cents per pound. Fillers tied in hands at 2 cents per pound. Trash out, all damaged tobacco excluded. To be delivered in sound packing condition at Orfordville about January, 1907, at buyer's option. There is no lien on this tobacco. Paid $25 on contract.

"E. N. Edwards, McFarland, Wis."

"No. 22. 8-25-1906.

"This is to certify that I have sold my 1906 crop of tobacco consisting of four and one-half acres to E. N. Edwards

for account of Roe & Brickson. Wrappers and binders in bundle at 14 cents per pound. Fillers tied in hands at 2 cents per pound. Trash out, all damaged tobacco excluded. To be delivered in sound packing condition at Orfordville, Wis., about January, 1907, at buyer's option. There is no lien on this tobacco. Received $25 on contract.

"ROY GRENAWALT."

The complaint averred that in the month of January, 1907, plaintiff had the said crop of tobacco ready for delivery and duly offered and tried to deliver the same to the defendants, but that said defendants refused to receive the same. Thereafter the plaintiff sold the tobacco for the best price he could obtain therefor, which was $243.05 less than the amount that would have been received under the contract in question, for which sum, less the $25 paid, he asked judgment. The defendants pleaded that the tobacco at the time fixed for delivery was found to contain a large amount of trash and damaged tobacco, to be unfit for packing, and not in sound packing condition. The defendants also pleaded and attempted to prove a release by the plaintiff, but consideration of that affirmative defense on their part is not necessary here.

The case was tried before the court and a jury, and the jury found specially that the tobacco at the time fixed for delivery was in sound packing condition, with all trash and damaged tobacco excluded. The evidence upon this question was very evenly balanced, and the court instructed the jury as follows:

"Upon the defendants in this case rests the burden of satisfying you by a preponderance of the evidence that this tobacco was not in sound packing condition, with all trash out and all damaged tobacco excluded."

The only question arising on this appeal is whether the foregoing instruction was correct. If the question whether the contract above quoted constituted a sale *in præsenti* or an executory contract of sale was new in this court much

might be said in support of either view; but we consider that question settled and the contract executory upon the authority of *Olson v. Mayer,* 56 Wis. 551, 14 N. W. 640. The indications of a present sale contained in this contract are overcome by other provisions of the contract, by the condition of the subject matter of the contract at the time of the contract, and the provisions for later delivery. Treating this, then, as an executory contract of sale and the action in question as an action for damages for breach of such executory contract by the defendants, it follows that the burden of proof was upon the plaintiff to show performance on his part of these conditions of the contract to be by him performed. The burden of proof was on the plaintiff to show, according to the terms of his pleading, "that in the said month of January, 1907, he had the said crop of tobacco ready for delivery, and duly offered and tried to deliver the same to the said defendants." If the tobacco was not then in sound packing condition it could hardly be said that the plaintiff "duly offered and tried to deliver the same to the said defendants." Performance on the part of the plaintiff required him not only to make delivery, but to make delivery of the article sold in the form prescribed by the contract; that is, wrappers and binders in bundles, fillers tied in hands, trash taken out, damaged tobacco excluded, and the tobacco to be in sound packing condition. Of course, a substantial compliance was all that was required, and there was proof to show such substantial compliance on the part of the plaintiff and counterproof on the part of defendants. But the court erred in its instruction to the jury by placing upon the defendants that burden of proof which in law rested upon the plaintiff. 1 Greenl. Ev. (16th ed.) § 74 *et seq.;* 2 Mechem, Sales, §§ 1203–1220; *Warren v. Bean,* 6 Wis. 120; Benjamin, Sales, §§ 600, 895.

The cases cited by respondent—*Locke v. Williamson,* 40 Wis. 377, and *Underwood v. Wolf,* 131 Ill. 425, 23 N. E. 598—were actions to recover the purchase price of goods

delivered and therefore not in point. In such cases, as was said in *Olson v. Mayer, supra,* stipulations in the contract which were only conditions while the contract remained executory sometimes become warranties by the execution of the contract. Neither is the case of *Redman v. Ætna Ins. Co.* 49 Wis. 431, 4 N. W. 591, in point. The contract of indemnity evidenced by a policy of insurance is separate and distinct from the warranties or representations which may have been made to induce the defendant to enter into such contract. It could hardly be claimed that one suing upon a contract of indemnity had the burden of proof to show that he did not procure assent to that contract by misrepresentation or by untrue or incorrect promissory warranty. For this very obvious error in the instructions of the court below the judgment must be reversed.

By the Court.—Judgment reversed.

JOHNSON, Respondent, vs. TUCKER, Appellant.

September 30—October 20, 1908.

Landlord and tenant: Estoppel to deny landlord's title: Wife leasing rooms in husband's house: Constructive eviction: Court and jury: Special verdict: Form of questions.

1. Where a married woman living with her husband in his house rented rooms therein and received the rentals as her own with his consent but not as his agent, one to whom she had so rented rooms could not, in an action by her for a balance of rent due, question her title to the premises.
2. Failure of a landlord for a considerable time to keep in repair the gas heater in a bath room is *held* not to have constituted, as matter of law, a constructive eviction of a lessee of rooms in the house.
3. A question in a special verdict, "Was the defendant evicted from the leased premises?" is *held* to have been proper, the jury being duly instructed as to the law pertaining to constructive eviction. A suggested question, "Was the gas heater out of repair?" would have been immaterial, because relating to a merely evidentiary fact.

Appeal from a judgment of the circuit court for Dane county: E. Ray Stevens, Circuit Judge. *Affirmed.*

This action was commenced in justice's court to recover a balance of $46, alleged to be due the plaintiff from the defendant for rent of certain rooms, and to recover the further sum of $4 for gas furnished to the defendant. It was alleged in the complaint that on May 22, 1906, plaintiff and defendant entered into an agreement whereby plaintiff leased to the defendant certain rooms in a dwelling house in the city of Madison for the term of one year at a rental of $23 per month, payable in advance, and that said defendant refused to pay the rent due on the 22d days of March and April, 1907. The defendant, by way of answer, alleged certain agreements made by the plaintiff to keep the premises in a proper state of repair, and a failure so to do on the part of the plaintiff, whereby the defendant was justified in vacating, and did vacate, the premises. The answer also denied all the allegations of the complaint not admitted. The trial in justice's court resulted in judgment for the plaintiff, from which judgment an appeal was taken and the case was tried before a jury in the circuit court for Dane county. A special verdict was returned by the jury, in which it was found: (1) That the defendant leased the rooms in question for one year from May 22, 1906. (2) That the plaintiff did not subsequently give the defendant permission to vacate the rooms before the expiration of the year. (3) That the defendant was not evicted from the leased premises. (4) That the plaintiff did not agree to accept $23 in full settlement of all claims against the defendant. Judgment was rendered on this verdict, and from such judgment this appeal is taken.

The defendant assigns as error: (1) Nonsuit should have been granted because the relation of landlord and tenant did not exist between the parties. (2) The court should have directed a verdict. (3) The special verdict is incomplete

and insufficient to sustain a judgment, in that there is no finding that the relation of landlord and tenant existed between the parties to the suit. (4) Defendant's motion to change the answers in the special verdict should have been granted. (5) The court erred in submitting questions of law to the jury.

F. K. Shuttleworth, for the appellant.

John C. Fehlandt, for the respondent.

BARNES, J. The appellant seeks a reversal of this judgment on three grounds: (1) Because the relation of landlord and tenant did not exist between the parties to the suit. (2) Because the defendant was evicted from the premises. (3) Because the special verdict was incomplete.

1. The first error assigned is predicated upon the proposition that the plaintiff is a married woman living with her husband and that the house in question belonged to the husband, and, therefore, if rent was due to any one, it was due to him. The testimony showed that the plaintiff, with the consent of the husband, for about fifteen years had been renting the rooms occupied by the defendant, and had been collecting rent all this time without let or hindrance from her husband, making such use thereof as she saw fit. The defendant rented the rooms from the plaintiff and paid her ten months' rent therefor. During this time the husband of the plaintiff made no claim to the rent, and, though he lived in the same house with the defendant, never talked with him upon the subject of rent in any way, and never took any step that could be construed as an attempted repudiation of his wife's authority to treat the rented rooms as her own and to do with them what she pleased. There is nothing to show that she was acting as the mere agent of her husband at the time the rooms were rented, or subsequently thereto, and the husband did not claim, and does not now claim, any right to the rent sued for. The sole ground

upon which the claim is based that the husband was in fact the landlord is his ownership of the property.

It was competent for the defendant to show that he did not rent the property from the plaintiff and that he did rent it from some one else. But this he might not do by showing that the lessor did not own the leased premises. The rule that, under such circumstances as are disclosed here, the tenant cannot question the title of his landlord, is so nearly axiomatic in the law that it is unnecessary to cite authority to support it. There was no competent evidence from which a jury would be warranted in finding that the relation of landlord and tenant did not exist between the parties. This conclusion renders it unnecessary to consider the effect of the failure of the defendant to comply with the provisions of secs. 3619 and 3620, Stats. (1898), if he desired to raise the question of title.

2. As to the existence of most of the acts which constituted the alleged eviction, there was a dispute in testimony, and it was for the jury to determine the existence or nonexistence of such alleged facts. As to the failure of the plaintiff to keep the gas heater in the bath room in a state of repair for a considerable length of time, about which there was no substantial dispute in testimony, this court cannot say as a matter of law that it was of sufficient moment to constitute a constructive eviction. If, instead of submitting to the jury the sufficiency of the details relied on to constitute an eviction, the trial court had held as a matter of law that they were insufficient, we would feel loath to disturb his conclusion in this regard. *Young v. Burhans,* 80 Wis. 438, 50 N. W. 343; *De Witt v. Pierson,* 112 Mass. 8; *Taylor v. Finnigan,* 189 Mass. 568, 573, 76 N. E. 203; Wood, Landl. & T. (2d ed.) sec. 477.

3. The third question in the special verdict is the following: "Was the defendant evicted from the leased premises?" to which the jury answered "No." Counsel claims that it

was error to submit this question to the jury, as it called for a conclusion of law and not of fact, and argues that the question should be: "Was the gas heater out of repair?" etc. The court instructed the jury on the law pertaining to constructive eviction. No exception was taken to such charge. The question submitted was proper and the one now suggested would have been immaterial, as it merely went to evidentiary facts, which at best only tended to show eviction and not to conclusively establish it.

By the Court.—Judgment affirmed.

SPARLING, Respondent, vs. UNITED STATES SUGAR COMPANY, Appellant.

October 1—October 20, 1908.

Master and servant: Injuries to servant: Unsafe place to work: Questions for jury: Assumption of risk: Contributory negligence: Fellow-servants: Champerty: Contingent fee: New trial: Newly discovered evidence.

1. In an action for injuries to an employee in defendant's sugar factory who had been sent at night to repair a pump in the boiler room and fell into a trench recently dug in the floor and full of scalding water, it is *held* upon the evidence (tending to show, among other things, that he had no knowledge of the existence of the trench, that no barriers had been erected to prevent any one from falling into it, and that the boiler room was at the time full of steam, rendering vision difficult) that the questions of assumption of the risk and of contributory negligence were for the jury.
2. The fact that plaintiff was helped out of the excavation nine or ten feet from the place where he claimed to have fallen into it, and that he gave no direct testimony as to how he reached that position, did not conclusively show the falsity of his story or render the manner in which the accident happened a matter of mere conjecture.
3. The digging of the trench for the purpose of repairing a sewer under the floor of the boiler room being an unusual and exten-

sive change in the room itself, not incidental in its character, but closely akin to the original preparation of a place to work, the skilled mechanic to whom such repairs had been committed was not a fellow-servant of the plaintiff, but was discharging the duty of the master to provide a safe place to work.

4. An agreement by the plaintiff in an action for personal injuries to pay his attorneys for their services a sum equal to one half of the recovery is not champertous where they do not agree to pay any of the costs.

5. A new trial asked on the ground of newly discovered evidence of two witnesses who were examined at the trial was properly denied where no sufficient reason was given why they were not then asked as to the alleged new fact, and where the suggested evidence would be merely cumulative.

Appeal from a judgment of the circuit court for Dane county: E. Ray Stevens, Circuit Judge. *Affirmed.*

Action for personal injuries. The defendant owned and operated a large sugar factory at Madison, which was operated night and day. The plaintiff was a millwright, and at the time of the accident had been employed by defendant for more than a month as foreman of the night repair gang, and his duties were to repair such breakages in the machinery, belting, shafting, or pumps as happened during the night. There was much heavy machinery in the factory. The boiler room on the first floor was 119 feet long and 54 feet wide, and contained eight upright boilers arranged in a line running lengthwise of the room, and nearly in the middle, in batteries of two. The room had a cement floor. At the rear or west side of the line of boilers was a long brick blow-off pit or flume, about three feet deep and three feet in width, covered with plank, in which was a blow-off pipe which was connected with each of the boilers. Between boilers 6 and 7, near the south end of the room, was a passageway seven and one-half feet wide leading to the front or east side of the boiler room, and under the floor in the middle of this passageway was a sewer pipe leading eastward from the flume and somewhat southward to a catch-basin under the floor at the

east side of the room. The blow-off pipe discharged into the sewer pipe. The blow-off pit or flume not only contained this pipe, but also served to carry off and discharge into the sewer any water accumulating on the floor of the boiler room. In the southeast corner of the room was a large tank intended to receive condensed steam which had been used in other parts of the works, in order that it might be used again in the boilers. It had been found impracticable to use this hot water for some little time before the accident, and it had been allowed to be discharged into the flume or onto the floor. Three or four days before the accident the sewer became stopped up and did not discharge the water, hence it accumulated in the flume or on the floor. To remedy this, the plaintiff with other workmen, some three days before the accident, placed a portable steam pump over the flume at a point about two feet from boiler 6 and seven feet from boiler 7, which pumped out the surplus water and discharged it through a pipe to the outside of the building. This pump was guyed by a rope running to a feed pipe about two feet above the floor on the side of boiler 7, and another rope running to a like pipe on the side of boiler 6, thus forming a partial barrier in front of the passageway mentioned between boilers 6 and 7.

On the afternoon of November 3, 1906, the defendant sent a man named Anderson, who was a skilled worker in cement and in charge of repairs to sewers, to repair the sewer. He attempted to blow out the obstruction, but did not succeed, and then commenced to break up the cement floor in the passageway above the sewer. He had made some progress when he quit work on Saturday night, and continued on Sunday, and by Sunday night had opened a trench over the sewer nearly three feet deep and about the same width, running from the flume eastward nearly twenty feet in the middle of the passageway. This was the condition when he quit Sunday night, and he testified that at that time he placed an inch-

pipe about seven feet long running from the pump to the feed pipe on boiler 7 as a barrier. The pump stopped working at some time during Sunday night and the excavation and flume filled with hot water and some water spread over the floor. At about 2 o'clock a. m. the plaintiff was sent to repair the pump. He testified that he knew nothing of the making of the excavation; that he entered the room with his lantern through a door on the west nearly opposite the passageway; that it was full of steam, so that he could see little; that he went directly to the pump, touched one of the pistons, stepped over the rope to reach the other, and took a step or two and fell into the trench. He was seriously scalded. An employee in the boiler room named Becker helped him out of the trench near the middle of the passageway next to boiler 7.

The jury returned a verdict finding that the defendant was negligent in not giving warning by barriers or lights of the excavation; that this negligence was the proximate cause of the injury; that the plaintiff was not guilty of contributory negligence, and had suffered damages in the sum of $6,500. Judgment on the verdict was rendered for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *Bashford, Aylward & Spensley,* and oral argument by *R. M. Bashford.*

For the respondent there was a brief by *Miner & Elver,* and oral argument by *F. M. Miner.*

WINSLOW, C. J. It is claimed that judgment should have been rendered for the defendant because the evidence conclusively showed, first, that the plaintiff assumed the risk or was guilty of active contributory negligence; second, that there was no negligence by defendant, and that if there was negligence in failing to put up a barrier it was the negligence of a fellow-servant.

Upon the first proposition the claim is that the evidence

conclusively showed that the plaintiff either knew of the excavation, or ought to have seen it had he been exercising ordinary care, and that he must have fallen into it about midway of its length while attempting to pass along the side of boiler No. 7, because Becker testifies that it was at this point he was helped out. We regard these propositions as untenable. The plaintiff testifies that he knew nothing of the excavation and there is really no testimony to the contrary, except that it appears that, upon his examination as an adverse witness before trial, he stated that he was in the boiler room and went through the passageway on the Saturday night before the accident. Upon the trial, however, he positively denied that he was in the boiler room on the night before the accident, and explained that if he said that he did not know or understand what he was saying. This presented merely a contradictory state of the evidence, and it was within the province of the jury to decide which story was correct.

As to the claim that he ought to have seen the excavation had he been exercising due care, there was abundant evidence that the room was filled with steam, rendering vision very difficult, and in fact it could hardly have been otherwise when it is considered that the excavation was filled with very hot water and a large part of the floor also covered with it.

Nor is it conclusively shown that he was attempting to pass along the side of the excavation when he fell in. Conceding that he was helped out nine or ten feet from where he claims to have fallen in, and that he gives no direct testimony showing just how he reached this position, it must be remembered that he was suddenly plunged in scalding water, and must without doubt have at once made desperate struggles to extricate himself. Probably few persons under such circumstances would be able to tell just what movements they made or where their struggles took them. We can see nothing in the fact that he was helped out at some distance from the place where he claims to have fallen in which con-

clusively establishes the falsity of his story, nor do we think that it renders the manner in which the accident happened a matter of mere conjecture.

The claim that the evidence shows beyond dispute that sufficient barriers were put up by Anderson must also be rejected. It is true there was evidence by several witnesses that a small pipe or a plank or both reached from boiler No. 7 to the pump. There was also evidence by several witnesses that there was no barrier there except the rope, and the rope had been placed there by the plaintiff himself, not as a barrier, but simply to steady the pump.

The claim that the failure to place sufficient barriers before the excavation was the default of a fellow-servant is equally untenable. The breaking up of the floor to repair the sewer was not a mere detail of the common occupation committed by the master to his employees to be done by them in the ordinary prosecution of their work, but an unusual and extensive change in the boiler room itself, not incidental in its character, but closely akin to the original preparation of a place to work, which was committed to a skilled mechanic. Under familiar principles, the man who was prosecuting this repair was not a fellow-servant of the plaintiff, but was discharging the duty of the master to provide a safe place to work. *Cadden v. Am. S. B. Co.* 88 Wis. 409, 60 N. W. 800; *Jarnek v. Manitowoc C. & D. Co.* 97 Wis. 537, 73 N. W. 62; *Grams v. C. Reiss C. Co.* 125 Wis. 1, 102 N. W. 586.

A claim of champerty is made. The evidence on the subject showed without dispute that the plaintiff contracted with his attorneys to pay them a sum equal to one half of the recovery for their services in prosecuting the action. There was no agreement that they should pay any of the costs. This does not constitute champerty. *Dockery v. McLellan,* 93 Wis. 381, 67 N. W. 733.

A motion for new trial was made by the defendant upon

alleged newly discovered evidence. The affidavits used upon the motion were those of Becker and Anderson, two witnesses who were fully examined on the trial, and these affidavits simply state a little more exactly the condition of the passageway between boilers 6 and 7 after the excavation was made, and bring out the fact that there was sufficient room to pass between boiler 7 and the excavation, a fact which was not inquired about directly when they testified on the trial. No sufficient reason is given why this fact was not inquired about upon the trial, and, moreover, witness Becker did testify on the trial that he walked to the middle of the passageway on the side next to boiler 7, and then assisted the plaintiff out of the excavation and onto the floor, so that there must have been room to pass. Thus the new evidence became merely cumulative. As a matter of fact, it seems to have been admitted all through the case that there was sufficient room to pass at the point in question, so that the supposed new evidence would have made no change in the situation.

By the Court.—Judgment affirmed.

DAUBNER, Respondent, vs. MCFARLIN, Appellant.

October 1—October 20, 1908.

Appeal: Review: Findings of fact.

Findings of fact by the trial court will not be disturbed unless contrary to a clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action for damages resulting from excavation by defendant on his own adjoining premises and consequent removal of lateral support for plaintiff's ground. Trial to the court,

and judgment for plaintiff for $100 damages and costs, from which defendant appeals.

The cause was submitted for the appellant on the brief of *Gilbert, Jackson & Ela,* and for the respondent on that of *Rufus B. Smith.*

Dodge, J. This case presents merely questions of fact as to which the evidence was, to say the least, fairly conflicting. This court ought not to be burdened, in the performance of its duty to important litigation, by the necessity of examining such questions. Counsel ought to be able to restrain clients from the bringing of such necessarily futile appeals. We discover no clear preponderance of evidence against the findings of the trial court.

By the Court.—Judgment affirmed.

Strange, Executor, Appellant, vs. Oconto Land Company, Respondent.

October 2—October 20, 1908.

(1, 2) *County board: Voting: Adoption of resolution: Records: Presumptions.* (3-9) *Taxation: Town officers: Failure to elect: Emergency provision: Authorizing officers of adjoining town to act: Constitutional law: Uniformity in town government and in rule of taxation: Due process of law:* De facto *officers.* (10) *Limitation of actions.*

1. The record of a meeting of a county board showing that ten members were present, that all of them except the chairman voted upon a resolution, five voting for and four against it, and that it was declared carried, is *held* to mean that it was declared carried by the chairman.
2. The chairman in such case will be presumed to have known the law (sec. 665, R. S. 1878) requiring all questions to be determined by a majority of the members present, and also to have understood his official duties. In declaring the resolution carried he must be held to have assented to and in legal effect voted for its passage; and the question was therefore duly determined in the manner required by the statute.
3. Sec. 1152, Stats. (1898),—providing that whenever the property of a town shall fail to be assessed for taxation because of the

neglect or refusal of the people to elect officers, the county board shall issue their warrant to the assessor and treasurer of a town next adjoining, requiring them to assess and collect the taxes due from such town to the state and county till an election shall be held therein, etc.,—does not violate sec. 9, art. XIII, Const., in making such temporary provision for an emergency.

4. A town which neglects or refuses to elect town officers does not have town "authorities," and in such emergency, for the collection of the state and county tax, other residents of the county, holding office in an adjoining town, may lawfully be authorized to act, even assuming that town officers must be residents of the town in which they hold office.

5. Sec. 1152, Stats. (1898), does not violate sec. 23, art. IV, Const., relating to uniformity in town and county government, since it provides a uniform rule for all towns in like condition.

6. If said sec. 1152, when first enacted in 1850 (Laws of 1850, ch. 175), did not violate sec. 1, art. VIII, Const., requiring the rule of taxation to be uniform, it did not become invalid under that constitutional provision by the subsequent enactment of a statute making all other assessments subject to revision by a board of review, even if the emergency assessment provided for in sec. 1152 were not subject to such revision. If either statute were invalidated by such nonuniformity it would be the later one.

7. The emergency assessment provided for in sec. 1152, Stats. (1898), is, like all other assessments, to be laid by the assessor before the board of review of his town for revision.

8. The emergency assessment and collection of taxes under sec. 1152, Stats. (1898), do not deprive landowners of their property without due process of law in violation of the XIVth amendment, Const. of U. S., since they are given ample notice and ample opportunity to pay the tax.

9. Officers of an adjoining town who acted pursuant to sec. 1152, R. S. 1878, in the assessment and collection of taxes in a town in which the people had neglected or refused to elect town officers, were officers *de facto* for the purpose of exercising the authority conferred by said section, and it is not necessary to the validity of their acts that they should be classified as town, county, or state officers.

10. Where, in an action commenced in 1908 to have tax deeds adjudged void, the complaint alleged that such deeds were issued and recorded in 1883 and 1885 respectively, it will be assumed, in the absence of averment to the contrary, that they were in the form required by law; and, the lands being alleged to have been at all times vacant and unoccupied, the complaint shows on its face that the action is barred by the statute of limitations.

Appeal from an order of the circuit court for Dane county: E. Ray Stevens, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the plaintiff's amended complaint in a suit in equity. The pleading demurred to averred that Robert McMillan died June 18, 1906, and the plaintiff was his executor, and that at the time of his death and since 1880 McMillan was the owner of the patent title to the land in question, which is and always has been vacant and unoccupied land situate in the town of Darling, Oconto county, the latter town adjoining the town of How in the same county. The town of Darling was "erected" by the county board of supervisors of Oconto county March 25, 1879, but the people of the territory so set off as a separate town neglected or refused to elect the officers required by law to be chosen therein, by reason of which neglect the property within said town might have failed to be assessed as provided by law. While this condition existed and on June 14, 1879, the county board of supervisors of Oconto county, which then consisted of twelve members, ten of whom were present, voted upon, as hereinafter stated, the resolution hereinafter set forth, and adjourned without day. They did not meet again until September 4, 1879, when the minutes of the former meeting were read and approved. Pursuant to such pretended resolution the board of supervisors of Oconto county, by their chairman and clerk and under seal of the county, on June 23, 1879, commanded and required Christ Weinboldt, assessor of the town of How, to assess the property in the town of Darling for the amount of taxes due from said town to the county and state until an election therein, and discharge all the duties in regard to the assessment of said taxes which would have devolved upon him had he been duly elected assessor of the town of Darling. In like manner, on September 20, 1879, the county board of supervisors of Oconto county, by their chairman and clerk and under seal of the

county, reciting that the same was done by virtue of sec. 1152, R. S. 1878, commanded the treasurer of the town of How to collect the amount of taxes due the county and state from the town of Darling in said county until an election should be held therein. Pursuant to such pretended resolution and on December 8, 1879, there was issued, annexed to the tax roll of the town of How, by "F. C. Schewr, acting town clerk," a warrant for the collection of taxes, directed to "Ludwig Suring, treasurer of the town of How," and this was twice renewed by the supervisors of the town of How. Thereafter and on December 8, 1880, there was issued, annexed to the tax roll of the town of Darling, by "G. T. Pickett, town clerk," a warrant for the collection of taxes, directed to "H. Jakel, treasurer of the town of How," and this was once renewed or extended by the supervisors of the town of How. In pursuance of these several warrants the assessor of the town of How assessed, and the treasurer of the town of How returned, said land as delinquent for the tax of 1879 and the tax of 1880. By reason of such delinquent return the land was, by the county treasurer of Oconto county, sold for this tax of 1879 to J. M. Simpson, a tax certificate of sale issued, upon which Simpson obtained a tax deed November 20, 1883, which was recorded in the proper office November 23, 1883. Simpson conveyed to Beyer and the latter to defendant. The land was in like manner sold and certificate of tax sale issued for the delinquent tax of 1880 on May 17, 1881, to "W. P. Cook, assignee." The latter took out a tax deed May 22, 1885, which was recorded May 25, 1885, and W. P. Cook conveyed to Sheldon Cook, who conveyed to defendant.

This action was commenced March 13, 1908, and no action of any kind had ever been commenced for relief from or to attack said tax sales or tax deeds prior to that time. The plaintiff or his grantors have paid all taxes on the land since and including 1881. The defendant claims title under

said tax deeds. The relief demanded and authorized by statute, if the tax deeds are invalid, is that the tax deeds be adjudged void and their cloud on plaintiff's title thereby removed, etc. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action and on the ground that the action was, as appears from the complaint, not commenced within the time limited by law, to wit, by secs. 2, 3, 4, 5, and 6, ch. 309, Laws of 1880, and secs. 671, 1188, 1189, and 1210*h*, Stats. (1898).

C. D. Cleveland, Jr., for the appellant, cited, besides other cases, *Cole v. Black River Falls*, 57 Wis. 110, 14 N. W. 906; *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327; *Norton v. Shelby Co.* 118 U. S. 425, 6 Sup. Ct. 1121; *Knox v. Cleveland*, 13 Wis. 245; *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465; *Oconto Co. v. Jerrard*, 46 Wis. 317, 50 N. W. 591; *Prentice v. Ashland Co.* 56 Wis. 345, 14 N. W. 297; *Pratt v. Milwaukee*, 93 Wis. 658, 68 N. W. 392; sec. 1152, R. S. 1878; sec. 1, art. VIII, Const.; 27 Am. & Eng. Ency. of Law (2d ed.) 593, 600; *County of Santa Clara v. So. Pac. R. Co.* 18 Fed. 385; *Railroad Tax Cases*, 13 Fed. 722, 735; *Knowlton v. Rock Co.* 9 Wis. 410; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833; secs. 1060, 1061, R. S. 1878; sec. 1, amend. XIV, Const. U. S.; *Hagar v. Reclamation Dist.* 111 U. S. 701, 4 Sup. Ct. 663; Cooley, Taxation, ch. 12, p. 625.

For the respondent there were briefs by *Greene, Fairchild, North & Parker*, and oral argument by *J. R. North*. Among other references upon the part of the respondent were sec. 665, R. S. 1878; *Mitchell I. & L. Co. v. Flambeau L. Co.* 120 Wis. 545, 98 N. W. 530; secs. 1188, 1210*h*, R. S. 1878; *Urquhart v. Wescott*, 65 Wis. 135, 26 N. W. 552; *Kennan v. Smith*, 115 Wis. 463, 91 N. W. 986; *Hamar v. Leihy*, 124 Wis. 265, 102 N. W. 568; *C. & N. W. R. Co. v. Oconto*, 50 Wis. 189, 6 N. W. 607; *C. & N. W. R. Co. v. Langlade Co.* 56 Wis. 614, 14 N. W. 844; *Dean v. Gleason*,

16 Wis. 1; *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270; *C. & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *McMillen v. Anderson,* 95 U. S. 37; *Winona & St. P. L. Co. v. Minnesota,* 159 U. S. 526, 16 Sup. Ct. 83; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421, 14 Sup. Ct. 1114; *Oskamp v. Lewis,* 103 Fed. 906.

TIMLIN, J. Appellant's first contention is that the tax deeds described in the complaint "were void because the entire proceeding is based on, and all authority of the tax officers is derived from, the resolution acted upon by the county board on June 14, 1879, which resolution is of no force and invalid, because it did not receive sufficient affirmative votes. The basis of this contention is section 665 of the Wisconsin statutes [R. S. 1878], which requires that all questions shall be determined by a majority of the members present. There were ten members present, and the recorded vote shows five voted 'aye' and four voted 'no.' On a call of the ayes and noes, therefore, the resolution was not carried." What would be the consequence if the resolution did not receive a majority vote, but was declared and assumed to have been adopted, and officers were thereupon appointed who assumed to and did act under such appointment, we need not here determine. See cases hereinafter cited respecting *de facto* officers.

The complaint sets out the minutes of the meeting of the county board on June 12 and 13, 1879, as follows:

"Members present—Royce chairman, Driscoll, Ruelle, Erley, Doyle, Whitney, McIver, Ellis, Pahl, and Tibbitts. . . ."

"June 14, 1879, 9 a. m. Board met pursuant to adjournment. Members present same as yesterday. . . . The following resolution was offered:

"'Whereas, the people of the territory which has been set off as the town of Darling have neglected to elect the officers required by law to be chosen therein, by reason whereof the

property of said town has failed to be assessed in the manner provided by law, therefore be it resolved that the chairman and clerk of this board are hereby ordered and directed to issue the warrant of this board to the assessor and treasurer of the town of How, requiring them to assess and collect respectively the amount of taxes due from said town of Darling to the state and county, till an election shall be held therein. Dated June 14, 1879.'

"On motion to adjourn till 2 o'clock p. m. the ayes and noes were called and the vote was taken as follows: . . . Motion declared carried. Two o'clock p. m. Board met pursuant to adjournment. Same members present as in forenoon. The ayes and noes were called on the resolution before the board on adjournment in the forenoon, as follows: Aye—Ruelle, Whitney, Ellis, Pahl, Tibbetts—5. No—Driscoll, Erley, Doyle, McIver—4. And the resolution was declared carried. . . . ROBERT ELLIS, Co. Clerk."

We take this record to mean that the resolution was declared carried by the officer whose duty it is, under ordinary parliamentary usages and rules, to so declare, namely, the chairman or presiding officer of the meeting. When the ayes and noes were called by him or by the clerk, the name of the chairman, Royce, was not called. Presumably the vote as called and taken was handed up to him and he declared the resolution carried. We think that in so doing he must be held to have assented to the passage of the resolution, which assent is in legal effect voting for its passage. This is a transaction nearly thirty years old, and all presumptions of the regularity of official action favor this view. We cannot presume that the chairman believed he had no authority to vote on the resolution, nor that he believed five was a majority of ten, nor that he believed that he was not to be counted as making one of the quorum present. We are rather to presume that he knew the law and understood his official duties, and that his action was informal but not illegal. The decided cases bearing on this question favor this view. *State v. Armstrong,* 54 Minn. 457, 56 N. W. 97;

Rushville G. Co. v. Rushville, 121 Ind. 206, 23 N. E. 72; *Small v. Orne,* 79 Me. 78, 8 Atl. 152. We think in the complaint it is shown presumptively that the resolution in question was carried by a majority of the members present, the chairman voting informally, but nevertheless voting.

The appellant, however, contends that sec. 1152, Stats. (1898), is unconstitutional (1) in that it provides for an assessment, collection, and delinquent return of taxes by persons who are not officers of the town in which the land was situated, elected or appointed as required by sec. 9, art. XIII, Const.; (2) that the section in question is invalid in that it provides for the exercise of such official acts by persons not residents of the town in which the property is situated; (3) that it violates sec. 23, art. IV, Const., relating to the uniformity of town and county government; (4) that it is contrary to sec. 1, art. VIII, Const., which provides that "the rule of taxation shall be uniform," because there is no board for review of an assessment thus made, although all other assessments are subject to revision by a board of review; (5) that it is contrary to sec. 1 of the XIVth amendment to the constitution of the United States, because it deprives the owners of property situate in the town therein mentioned of such property without due process of law. Taking up these objections *seriatim:*

(1) Sec. 1152, Stats. (1898), which comes down to us from ch. 175, Laws of 1850, and sec. 64, ch. 18, R. S. 1858, makes temporary provision for an emergency in which there would be, but for this statute, an entire suspension of the functions of a public office, and is therefore valid and constitutional as against this first objection, within the rule of *Sprague v. Brown,* 40 Wis. 612; *Du Page Co. v. Jenks,* 65 Ill. 275; 23 Am. & Eng. Ency. of Law (2d ed.) 340, and cases cited.

(2) The town which neglects and refuses to elect town officers cannot have town "authorities," and in such emer-

gency for the collection of the state and county tax other residents of the county, holding offices in the adjoining town, can lawfully be authorized to act, even if we assume that town officers must be residents of the town in which they hold the office. This follows from the emergency rule last above referred to.

(3) There is no violation of the uniformity of town government in a statute which provides a uniform rule for all towns in a like condition; that is to say, all towns in which the people shall neglect or refuse to elect the officers required by law to be chosen therein, by reason whereof the property of such town shall fail to be assessed in the manner provided by law. *State ex rel. Busacker v. Groth,* 132 Wis. 283, 112 N. W. 431, and cases cited in opinion.

(4) The statute (sec. 1152) has been on the statute books of this state since 1850, and during the first eighteen years of its existence there was no general statute providing for a board of review. By ch. 130, Laws of 1868, boards of review were established. How ch. 175, Laws of 1850 (sec. 64, ch. 18, R. S. 1858), could have been within the rule of uniformity of taxation and on this ground constitutional at the time of enactment and during the first eighteen years of its existence, and then become unconstitutional by the enactment of a subsequent statute, is difficult to imagine. In such case, and where unconstitutional lack of uniformity would be thus produced, it is usually the later enactment which must fall. The later enactment is the law providing for boards of review, according to appellant's contention, in all towns, cities, and villages of the state, except towns which have neglected and refused to elect officers. This rule of uniformity permits reasonable classification; but, waiving this consideration, if the consequence of nonuniformity followed the enactment of ch. 130, Laws of 1868, and applied to the last-mentioned law, it would then appear that there was no board of review lawfully provided for in any town, but the appellant's rights in this case would be in no way affected,

nor could he be heard to assail as unconstitutional a law which did not affect him injuriously. Next, the law relating to boards of review does not expressly exclude from review before such board the extraordinary assessment referred to in sec. 1152. On the contrary, that law contains general provisions requiring the assessors to lay before the boards of their respective towns their whole assessment, manifestly including the extraordinary or emergency assessment made under sec. 1152. See sec. 1061, Stats. (1898). We can find no taint of unconstitutionality upon this fourth ground in either the law providing for this emergency assessment or in the law establishing boards of review.

(5) We see no valid reason for upholding the claim that art. XIV, Amendm. Const. U. S., is infringed by a state law such as we have described above, relating to taxation. The property owner knows that he is expected to pay annually a tax on all his property. The fact of his ownership and the general statutes amply inform him that some tax is due and that it becomes due annually. If the property goes untaxed for any year, it is an event so extraordinary as to put him upon inquiry. The town in which the property is situate is a matter of public law, and whether or not the people of that town have neglected or refused to elect officers, the provisions for such emergency found in sec. 1152, the return delinquent to the county treasurer, the records and published notices of sale of the latter, and the record of the tax sale are all acts of such a public nature as to afford ample opportunity to pay, and ample notice within the requirements of this XIVth amendment so far as the amendment applies to tax matters.

Lastly, in any event the assessor and treasurer of the town of How were officers *de facto*. There were the offices existing by force of law, but vacant by default of the electors, and there were persons claiming the right under the statutes of the state to exercise the functions of these offices and actually engaged in such exercise. *Cole v. Black River Falls*, 57

Wis. 110, 14 N. W. 906; *C. & N. W. R. Co. v. Langlade Co.* 56 Wis. 614, 14 N. W. 844; *In re Burke,* 76 Wis. 357, 45 N. W. 24; *In re Manning,* 76 Wis. 365, 45 N. W. 26; *Farrier v. State ex rel. Dugan,* 48 N. J. Law, 613, 7 Atl. 881. They were not necessarily town officers *de facto* of the town of Darling. They were officers *de facto* in any event for the purpose of exercising the authority conferred by sec. 1152 in the emergency therein provided for, and it is not necessary to the validity of their acts that we be able to classify these special officers as town, county, or state officers.

The complaint alleges that tax deeds were issued and recorded, and in the absence of averment to the contrary we must assume that such tax deeds were in the form required by law, thus entitling them to the presumption in favor of the regularity of all prior proceedings as specified by statute, and to the protection of the statute of limitations when the lands are vacant and unoccupied. The complaint, therefore, shows that the cause of action there attempted to be set forth is barred by the statute of limitations, within the rules announced in *Pratt v. Milwaukee,* 93 Wis. 658, 68 N. W. 392; *Kennan v. Smith,* 115 Wis. 463, 91 N. W. 986; *Hamar v. Leihy,* 124 Wis. 265, 102 N. W. 568; *Oconto Co. v. Jerrard,* 46 Wis. 317, 50 N. W. 591, and cases cited in those opinions.

By the Court.—The order of the circuit court sustaining the demurrer is affirmed.

VILLAGE OF LITTLE CHUTE, Respondent, vs. VAN CAMP, Appellant.

October 2—October 20, 1908.

Constitutional law: Delegation of legislative power to executive officer: Regulation of saloons: Village ordinances: Validity.

1. The power to regulate saloons vested in village boards by subd. 26, sec. 893, Stats. (1898), is a legislative power, which cannot be delegated.

2. A village ordinance requiring all saloons to be closed during certain hours "unless by special permission of the president," is void because it attempts to delegate legislative power to an executive officer and because it attempts to give him arbitrary power, allowing him in the execution of the ordinance to discriminate among persons similarly situated.
3. The clause giving the president such power being evidently a material inducement to the otherwise valid parts, the whole ordinance is void.

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *J. Elmer Lehr,* and for the respondent on that of *Joseph Chopin* and *Albert H. Krugmeier.*

WINSLOW, C. J. The defendant was convicted of violating an ordinance of the plaintiff village reading as follows:

"All saloons in said village shall be closed at 11 o'clock p. m. each day and remain closed until 5 o'clock on the following morning, unless by special permission of the president."

We regard the ordinance as void for two reasons: First, because it attempts to confer arbitrary power upon an executive officer, and allows him, in executing the ordinance, to make unjust and groundless discriminations among persons similarly situated (*State ex rel. Garrabad v. Dering,* 84 Wis. 585, 54 N. W. 1104); second, because the power to regulate saloons is a lawmaking power vested in the village board (Stats. 1898, sec. 893, subd. 26), which cannot be delegated. A legislative body cannot delegate to a mere administrative officer power to make a law, but it can make a law with provisions that it shall go into effect or be suspended in its operation upon the ascertainment of a fact or state of facts by an administrative officer or board. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm., ante,* p. 146, 116 N. W. 905. In the present case the ordinance by its terms gives power to the

president to decide arbitrarily and in the exercise of his own discretion when a saloon shall close. This is an attempt to vest legislative discretion in him, and cannot be sustained.

It is said that the latter clause of the ordinance may be stricken out as unconstitutional, and the balance, requiring saloons to close at 11 o'clock, may still be held valid. This, however, cannot be done, because it is very plain that the clause giving the president power to suspend the operation of the law at will is a compensation for the first clause. They are bound together, and the invalid clause was evidently a material inducement to the otherwise valid portion. *State ex rel. Walsh v. Dousman,* 28 Wis. 541.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment discharging the defendant.

JOHNSON, by guardian *ad litem,* Respondent, vs. FRATERNAL RESERVE ASSOCIATION, Appellant.

October 2—October 20, 1908.

Witnesses: Competency: Transactions with persons since deceased: Life insurance: Evidence: Declarations by assured.

1. The competency of a stockholder of a corporation to testify as a witness was not, under any circumstances, affected by sec. 4069, Stats. (1898), prior to the amendment thereof in 1907.
2. Under sec. 4069, Stats. (1898), originally, an officer or stockholder of a corporation was not included in the designation "party" nor to be considered as such by reason of the corporation being a party.
3. Evidence of what a deceased assured person said inconsistent with the answers contained in his application, which is not part of the *res gestæ,* is not competent against the beneficiary to prove the falsity of such answers.
4. Statements made by an assured person inconsistent with the answers contained in his application, not a part of the *res gestæ,* are only provable to show knowledge on his part of the falsity of such answers when that is material and there is competent evidence warranting a finding that the answers were false.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover upon a fraternal benefit insurance certificate. The defendant contested plaintiff's claim upon the ground that the assured, as a part of the insurance contract, warranted that she had never been advised by any physician that her life was not safely insurable; that within the five years preceding her application she had not required, for any personal ailment, the services of a physician; that she was not, to the best of her knowledge, afflicted with any infirmity tending to impair or shorten her life; that she had never been afflicted with cancer or tumor; that she had never had any illness, local disease, or personal injury not specifically inquired about; and that she had never had any disorder or symptoms of ovarian or uterine disease,—when in fact she had been advised by her physician that her life was not safely insurable; she had been attended by a physician for a serious personal ailment shortly before making her application for insurance; was then to her knowledge suffering from a serious disorder; a serious cancer and tumor; an ovarian and uterine disease, which continued to the time of her death and produced the same. Other matters were stated in the answer not necessary to be particularly referred to.

The jury found specially that the assured at the time she applied for insurance had not been afflicted with any disorder or disease, such as menstrual disorder or symptoms of ovarian or uterine disease or cancer or tumor, or had any illness, local disease, or personal injury, or been advised by a physician that she was not safely insurable, or within the preceding five years had required the services of any physician for any personal ailment; and that she was then to her best knowledge free from all disorders, weaknesses, or infirmities tending to impair her constitution or shorten her life. Upon such verdict judgment was ordered and rendered in plaintiff's favor.

For the appellant the cause was submitted on the brief of *E. R. Hicks* and *M. Eberlein.*

E. V. Werner, for the respondent.

Marshall, J. The defense relied on, as indicated in the statement, is that the assured, Cecelia M. Johnson, in her application for membership in appellant corporation, made false representations in the particulars covered by the special verdict respecting her then and prior condition, her having required the services of a physician, and her knowledge of being materially afflicted presently and prospectively with infirmities impairing her insurability. To establish the defense some members of appellant were called as witnesses and were held incompetent to testify under sec. 4069, Stats. (1898), because of their interest in the result.

The trial occurred prior to the amendment of such section by ch. 197, Laws of 1907, whereby stockholders, officers, and trustees of any corporation were added to persons theretofore rendered incompetent to testify, with some exceptions not necessary to here refer to, in case of the corporation being a party to the litigation and the opposite party having derived his title or sustaining his liability to the cause of action from, through, or under such deceased person. Therefore, it is unnecessary to decide at this time whether a member of a beneficiary organization is a stockholder of a corporation within the meaning of the amended section. Prior to the amendment the incompetency went only to parties to the action and others not necessary to refer to here. It did not, expressly at least, include stockholders in a corporation. So unless one so circumstanced is to be regarded as a party when the corporation is such, within the meaning of the section as unamended, then the ruling of the court was right irrespective of whether a member of a fraternal organization is a stockholder therein or not.

The question presented, narrowed as above indicated, is

ruled in appellant's favor by *Hanf v. N. W. M. Aid Asso.* 76 Wis. 450, 45 N. W. 315; *In re Will of Bruendl,* 102 Wis. 45, 78 N. W. 169; and *Twohy M. Co. v. Estate of McDonald,* 108 Wis. 21, 83 N. W. 1107. The first case cited restricted the scope of the term "party" as used in the statute to those who were at common law incompetent to testify by virtue of their interest, and in the next case it was distinctly held that an officer of a corporation was not within the statutory incompetency notwithstanding his interest in the result of the litigation. We have not overlooked the change in 1901. It does not affect the question under consideration. It is for that reason, doubtless, that the amendment of 1907 was made. That, as it seems, is an unmistakable legislative recognition that the language of the section theretofore did not include a stockholder of a corporation.

The evidence of the witnesses above referred to, which was rejected, related to mere declarations of the deceased made at times so distant from that of the application as to be inadmissible as part of the *res gestæ,* and counsel for appellant make no claim to the contrary. It was not admissible as evidence of the main facts or any of them, viz., that the assured made some false misrepresentation as to her insurability, in that she was or had been afflicted with some one or more of the infirmities in respect to which she was interrogated. Laying aside as mere hearsay such evidence, there was none introduced or offered tending to establish that such main facts or any of them existed. That being so, the rulings rejecting evidence were harmless, and the similar evidence received did not establish or tend to establish the defense. *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378; *McGowan v. Supreme Court I. O. F.* 104 Wis. 173, 80 N. W. 603. The effect thereof is this: The beneficiary in a policy of insurance, whether issued by a fraternal society or otherwise, has such a vested interest therein that upon its maturing without such interest having been divested and an

action being brought by such beneficiary to enforce the policy, alleged misrepresentation made by the assured in taking it out cannot be supported by evidence of his declarations, unless they were made so near the time of the application and so closely related thereto as to so characterize some act or fact respecting his then condition as to be a part of the *res gestæ;* that otherwise such evidence is not admissible in the absence of independent proof of the falsity of the application in respect to matters referred to in the declarations and then only to prove knowledge of such falsity on the part of the assured.

In view of the foregoing there was no evidence impeaching the *prima facie* case made out by plaintiff and a verdict should have been directed accordingly. The judgment appealed from is therefore right regardless of any error committed in the instructions. For that reason numerous errors claimed to have been made in respect thereto need not be considered.

By the Court.—The judgment is affirmed.

ROHRER, Appellant, vs. LOCKERY and others, Respondents.

October 2—October 20, 1908.

Vendor and purchaser of land: Severed timber, when treated as personalty: Oral contract: Statute of frauds: Evidence: Replevin: Who may maintain.

1. When, by consent of the vendor and vendee in a land contract, who together own the whole title, the timber on the land is severed therefrom, it may be dealt with as personal property.
2. So *held* in a case where the timber was cut by the vendee and the logs delivered at the mill of a third person under an oral agreement that the vendor should have them sawed into lumber and sell it and apply the net proceeds upon the purchase price of the land.

3. Even if such oral agreement was invalid, under the statute of frauds, as an executory contract, it might be considered as indicating the meaning and purpose of the delivery of the logs at the mill.
4. Delivery of the logs at the mill for the purpose mentioned would vest in the vendor of the land possession and a special property sufficient to enable him to maintain replevin against a stranger taking the logs.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Plaintiff having given a land contract for certain real estate for something over $2,000, of which about $200 was paid, which contract had by assignment become the property of Levi Bergstrasser, who had, however, taken no manual possession of the real estate, an arrangement was made between plaintiff and Levi Bergstrasser for the latter to procure certain pine timber on the premises to be cut and delivered to the plaintiff at a designated point and that the plaintiff should pay the expenses of cutting, hauling, and of sawing, and should dispose of the lumber and apply the net proceeds thereof upon the purchase price of the land. In pursuance of this arrangement George Bergstrasser, father of Levi, cut and hauled the logs to the designated place, at the sawmill of a third party, and there left them. A few days afterward, and after some had been sawn, they were levied upon under an execution against George Bergstrasser, and, without plaintiff's knowledge, were sold by the sheriff, *Lockery,* to the defendants *Hoffman* and *Rockdaschel,* or one of them. Plaintiff, learning of this fact, made demand for redelivery of the logs and lumber into which they had been sawed, which was refused by the defendants *Hoffman* and *Rockdaschel.* Whereupon this action in replevin was brought therefor.

The defendants set up, as their only claim, the sale on execution against George Bergstrasser. Upon the trial, after proof tending to establish the facts above stated, the court, on motion of the defendants to dismiss the action, held that the plaintiff sought to recover on the strength of an oral agree-

ment made after the land contract, which was void under the statute of frauds, because the growing trees were real estate. He thereupon entered judgment reciting a directed verdict of the jury in favor of the defendants, but merely adjudging that the defendants recover costs from the plaintiff, from which judgment the plaintiff appeals.

For the appellant there was a brief by *Olen & Olen,* and oral argument by *O. L. Olen.*

For the respondents there was a brief by *Giles H. Putnam,* attorney, and *Brown, Pradt, Genrich & Anderson,* of counsel, and oral argument by *Mr. Putnam.*

Dodge, J. We need not consider the extent of the right of the vendor in a land contract who holds the legal title, though only in trust for the security of unpaid purchase money and for the equitable title of the vendee, to vindicate those rights against a mere stranger who wrongfully invades them, as by appropriating timber from the land. *Bartz v. Paff,* 95 Wis. 95, 69 N. W. 297; *Foster v. Lowe,* 131 Wis. 54, 60, 110 N. W. 829. It is very clear that when, by consent of the vendor and vendee, who together own the whole title, the timber on such land becomes severed therefrom, it may be dealt with as personal property. Hence, whether the so-called agreement for the cutting was valid or not, when the severance took place the logs became personal property. It was then entirely competent for Levi Bergstrasser, however absolute his title either to the logs or the land from which they were cut, to deliver them to plaintiff on any terms he saw fit. Evidence tends to prove that he did deliver them by his agent and employee, George Bergstrasser. The purpose of such effective delivery may be ascertained from the previous conduct of the parties, whether or not that conduct would have constituted a valid executory contract. *Taylor v Young,* 61 Wis. 314, 21 N. W. 408; *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229; *Voss v. Voss,* 134 Wis. 52, 113 N. W. 1097; *King v. Graef, post,* p. 548, 117 N. W. 1058.

The previous conversations of the parties may be considered as indicating the meaning and purpose of the act of delivery of the logs in question at the sawmill. That being so, there was evidence tending to show that the delivery was intended to place them in plaintiff's control for the purpose of having them sawed, selling them, and out of the money reimbursing the expense of cutting, hauling, and sawing, and applying the balance to the debt of Levi Bergstrasser to the plaintiff. If the jury so found, the delivery would vest in plaintiff possession and a special property sufficient to enable him to maintain replevin against a stranger. *Frisbee v. Langworthy,* 11 Wis. 375; *Riess v. Delles,* 45 Wis. 662; *Dresser v. Lemma,* 122 Wis. 387, 391, 100 N. W. 844. We are satisfied that there was evidence from which the jury might have so found, and that the trial court erred in ordering and entering judgment against plaintiff.

By the Court.—Judgment reversed, and cause remanded for a new trial.

REFFKE, Administrator, Respondent, vs. PATTEN PAPER COMPANY, LIMITED, Appellant.

October 2—October 20, 1908.

Master and servant: Death of servant: Negligence: Special verdict: Indefiniteness: Appeal: Reversal: Directing new trial: Instructions to jury: Defining "ordinary care."

1. In an action for death of an employee in a mill a special verdict from which it cannot be determined whether the jury found that defendant was negligent in not furnishing a safe working place for deceased, in furnishing an unsafe machine at which to work, or in exposing him to unguarded and unfenced belting, gearing, shafting, etc., so located as to be dangerous to employees, all of which forms of negligence were charged in the complaint, is *held* so indefinite and defective as to necessitate a new trial, in view of the fact that the defense of assumption of the risk, available as to the other matters, was not, under sec. 1636*jj*, Stats. (Supp. 1906; Laws of 1905, ch. 303), avail-

able as to the unguarded gearing, and that the rights of the parties in that respect seem to have been overlooked at the trial.

2. On reversal of a judgment in plaintiff's favor in an action for death caused by negligence, where the evidence, though tending to show defendant's negligence, was too vague and conjectural to justify a finding that such negligence proximately caused the death, but the court is not satisfied that all the available evidence on these questions was adduced on the trial, a new trial is ordered.

3. Instructions to the jury defining ordinary care as "such care as a prudent man of the requisite skill will take under the circumstances of the particular case" and "such care as ordinarily prudent men exercise in matters affecting their own interests," are *held* erroneous.

Appeal from a judgment of the circuit court for Outagamie county: John Goodland, Circuit Judge. *Reversed.*

An action to recover damages for personal injuries to plaintiff's intestate, which are alleged to have been caused by defendant's negligence. The defendant is a corporation engaged in the manufacture of paper at Appleton, Wisconsin. Leo Reffke, plaintiff's intestate, was employed as a laborer in defendant's paper mill and was engaged as a helper to operate a paper machine. It is alleged that Leo Reffke was twenty-one years old at the time of accident, namely, November 21, 1906; that he was of limited experience in the work as a helper; that a part of his duties as such helper consisted in placing drier felt on a revolving pulley and in removing such drier felt while the pulley and belt were in motion, and it is alleged that he was injured while in the performance of the duty. It is alleged that defendant was negligent in not furnishing the deceased a safe machine, a safe place to work, and that the defendant negligently exposed him to unguarded and unfenced belting, gearing, shafting, and flywheels, making them dangerous, and that such negligence of the defendant was the proximate cause of the decedent's injuries and death. The plaintiff sues to recover the damages caused by such injuries and death. The deceased was unmarried and had no children, but left his

father, the plaintiff, and Hermina Reffke, his mother, surviving him. Plaintiff was duly appointed administrator of decedent's estate.

The defendant admits that it is engaged in the paper manufacturing business as alleged, that Leo Reffke was in its employ, and was on the day of the accident engaged as a machine helper; denies that it was negligent in any of the respects charged by the plaintiff; alleges that it furnished decedent safe and suitable machines at which to work, a safe place in which to perform his work, and that it properly guarded and fenced all dangerous belting, shafting, gearing, and pulleys; and denies that decedent was exposed to any dangerous, unguarded, and unfenced machinery and appliances as alleged by plaintiff.

The case was tried to a jury, which rendered a special verdict. The second question of the special verdict is: "At the time and place in question, did the defendant use ordinary care and prudence to prevent injury to the plaintiff's intestate while engaged in performing his duties as employee?" The jury answered this question in the negative. By questions 3 and 4 the jury found that "the defective and unsafe condition of the machinery and appliances alleged to have existed at the time and place in question [was] the proximate cause of the injuries," and that such condition had existed a sufficient length of time for the defendant, in the exercise of ordinary care, to have discovered and repaired it. They also found that the deceased was not guilty of any want of ordinary care which contributed to produce his injuries, and assessed the damages plaintiff sustained as a result of Leo Reffke's death. Judgment was awarded against the defendant for the amount of damages assessed by the jury and the costs of the action. From this judgment defendant appeals.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent the cause was submitted on the brief of

Albert H. Krugmeier, A. M. Spencer, and *Frederick V. Heinemann.*

Siebecker, J. The appellant urges numerous errors. They need not all be considered, in view of our conclusion that the special verdict does not cover the material issues with sufficient certainty to show unequivocally how the jury resolved the issues litigated.

The complaint charges that the defendant negligently furnished the deceased an unsafe place to work, that it negligently furnished an unsafe and dangerous machine at which he was engaged to work, and that it negligently omitted to safely guard or fence, for the protection of the deceased, the shafting, belting, gearing, and flywheels so located in its factory as to be dangerous to its employees. The defendant denied these charges of negligence, and the issues thus raised were litigated upon the trial. In answer to one of the questions of the special verdict the jury found that "at the time and place in question the defendant [did not] use ordinary care and prudence to prevent injury to the plaintiff's intestate while engaged in performing his duties as employee," and by their answer to another question they found that the "defective and unsafe condition of the machinery and appliances alleged to have existed at the time and place in question [was] the proximate cause of the injuries." From these findings it cannot be ascertained whether the jury found that the defendant was negligent in not furnishing a safe place in which to work, in not furnishing reasonably safe machinery and appliances, or in failing to properly guard and fence, for the protection of its employees, the machinery and appliances in the paper mill so located as to be dangerous to its employees. All of these grounds of negligence are included in the complaint and should be definitely covered by the verdict.

The indefiniteness of the verdict becomes a material consideration in view of the allegation that defendant violated

the provisions of sec. 1636*j*, Stats. (1898), by omitting to properly guard the belting and machinery to protect its employees from danger. If the jury found the defendant guilty of this alleged negligence and that it was the proximate cause of the injury to the deceased, then, under sec. 1636*jj*, Stats. (Supp. 1906), the deceased could not be held to have assumed the risk; but if they negatived this charge of negligence and found that the injury was caused by any of the other alleged grounds of negligence, then this defense would be available in the case. The rights of the parties under the law respecting this defense under these different situations seems to have been wholly overlooked on the trial of the case. *Klotz v. Power & M. M. Co., ante,* p. 107, 116 N. W. 770. In view of the rights of the parties under these issues, the case was not submitted under proper instructions, and we are therefore not informed by the special verdict that the jury passed on these questions, and the record is left so defective that a new trial will be required.

It is contended by the appellant that the court should have directed a verdict in its favor because there is no evidence of negligence. The record is very unsatisfactory on this subject. The facts and circumstances of the accident as elicited before the court and jury do not clearly indicate that the evidentiary facts available were fully disclosed, and, so far as shown, additional testimony may be forthcoming upon a new trial. The evidence adduced on the question of defendant's negligence justified the court in denying defendant's motion for direction of a verdict upon the ground that there was no evidence tending to support any of the allegations of negligence. The evidence adduced on this trial upon the question of whether defendant's negligence proximately caused the injury to the deceased is too vague and conjectural to support the jury's finding to question 3 of the special verdict, which covers the issue of proximate causation. But, as indicated above, we are not satisfied that all of the evidence on these questions was adduced upon the

trial, and we therefore deem it proper to order a new trial of the case.

In view of this result it is not necessary to consider all of the exceptions argued, but we deem it well to call attention to some which are likely to arise upon a retrial of the cause. The court in its instructions to the jury gave various definitions of ordinary care, among which were these:

"Ordinary care is such care as a prudent man of the requisite skill will take under the circumstances of the particular case."

"Ordinary care is such care as ordinarily prudent men exercise in matters affecting their own interests."

These definitions are not in harmony with the standard of ordinary care adopted and approved in the decisions of this court. They erroneously fix the standard of ordinary care as measured by the conduct of "prudent men of the requisite skill," and as such care as "prudent men exercise in matters affecting their own interests."

The court in effect instructed the jury that there was no evidence tending to show that deceased was guilty of negligence contributing to cause his injury. We are of opinion that this was erroneous. The facts and circumstances of the case bearing on this issue are not so clear that it can be determined by the court as a question of law in his favor. This question should have been submitted to the jury with appropriate instructions, and the jury's attention should have been called to the provisions of sec. 1636*jj*, Stats. (Supp. 1906), which exempts him from the assumption of risk under certain circumstances.

By the Court.—The judgment of the lower court is reversed, and the cause remanded for a new trial.

LARZELERE, Appellant, vs. WOOD, Respondent.

October 2—October 20, 1908.

Adverse possession: Sufficiency of evidence: Appeal: Review: Questions of fact.

1. **The evidence in an action of ejectment is *held* insufficient to show plaintiff's continuous adverse possession of the land for twenty years.**
2. **Deference is due the judgment of the trial court on questions of fact, since it is in a better position to determine and better able to judge of the weight and credibility of the evidence than this court.**

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an action of ejectment brought to recover the possession of land fourteen rods east and west by twenty-seven rods north and south, situate in the northwest corner of the N. W. ¼ of the N. E. ¼ of section 10, town 31 N., range 14 E. The complaint is in the usual form, and the answer denies the plaintiff's title and alleges ten years' adverse possession by defendant under a written instrument. The plaintiff claims title by adverse possession for twenty years. The action was brought to trial in November, 1907, before the court and a jury. At the close of plaintiff's evidence the court granted a nonsuit, and judgment was entered dismissing the complaint, with costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Goodrick & Goodrick,* and oral argument by *A. B. Goodrick.*

Henry Hay, for the respondent.

KERWIN, J. The only question upon this appeal is whether there was any evidence sufficient to carry the case to the jury. The plaintiff sought to establish his title by adverse possession for twenty years. There is evidence that he entered in 1872 and did some clearing; that he agreed

with the owner to purchase the property for two loads of hay, which he never delivered, and never got a deed; that he occupied until 1889 and then went to Antigo. He seeks to make proof of continued adverse possession from 1889 to 1892 by occupancy through his tenants. He swears that he employed his nephew for a year, but there is no evidence that this tenant ever occupied. He next proves that after a year or two he rented the premises to one H. McConley. There is no evidence of when McConley took possession or how long he continued in possession. After McConley's occupancy one Theodore Smith took possession, and, so far as the evidence shows, Smith took possession in 1894. He was in possession about two years and vacated in 1896. Now, as the evidence stands, it would seem that there was a break in the continuity of possession between 1890 and 1892 of one year and probably more. It also appears from the evidence that plaintiff, soon after he took possession, built a log fence around the property in question, and this fence was there in a patched-up condition in 1889, when he left the property. But there is no evidence that the fence continued until 1892. On the contrary, the evidence is that before 1892 the property was used as commons for the pasture of the cattle of the neighborhood. The defendant sixteen or seventeen years before the commencement of this action took possession of the property and fenced in part of it. This action was tried in November, 1907, so that sixteen years before would be in 1891; and it also appears from the evidence that when defendant took possession the property had the appearance of having been unoccupied for some time. It therefore appears that before the expiration of twenty years from the time plaintiff took possession the property was vacant and a part of it in possession of defendant. The rule in respect to the proof required to establish title by adverse possession for twenty years has been often laid down by this court, and it is only necessary to refer to some of the cases. *Sydnor v. Palmer*, 29 Wis. 226; *Warren*

v. Putnam, 63 Wis. 410, 24 N. W. 58; *Allis v. Field,* 89 Wis. 327, 62 N. W. 85; *Ryan v. Schwartz,* 94 Wis. 403, 410, 69 N. W. 178; *Ill. S. Co. v. Budzisz,* 115 Wis. 68, 84, 90 N. W. 1019; *Ill. S. Co. v. Jeka,* 123 Wis. 419, 101 N. W. 399; *Furlong v. Garrett,* 44 Wis. 111.

The printed case is quite defective in the omission of much of the material evidence on the question presented. Nor is the evidence as it appears in the bill of exceptions as positive and satisfactory as the law requires under the rule in such cases. Deference is due the judgment of the trial court on questions of fact, since he is in a better position to determine and better able to judge of the weight and credibility of the evidence than this court. *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909.

After a careful examination of the evidence we cannot say that the court below was wrong in granting the nonsuit; therefore the judgment must be affirmed.

By the Court.—The judgment is affirmed.

McNaughton, Appellant, vs. Borth and another, Respondents.

October 3—October 20, 1908.

Trespass: Cutting of timber: Mistake: Evidence: Damages.

In an action for trespass by cutting timber it appeared from the evidence that defendants had positive knowledge of the existence and location of the witness trees to a quarter-post on the section line dividing their land from plaintiff's land on the east, and knew that such trees were at a distance west of a straight line between the section corners; that when about to cut the timber they ordered a survey by one who had no knowledge of such trees, and that they did not in any way help him

to find the quarter-post, although they knew that it determined the proper location of the line; that afterwards, knowing that he had not found the post but had probably passed to the east of it and that his survey was therefore unfinished and imperfect, and without giving him reasonable opportunity to find it, they ordered him away to another survey. *Held*, that there was no support for a finding by the jury that the cutting of timber on plaintiff's land east of the true line was done by mistake; that such finding should have been changed by the court; and that plaintiff was entitled to recover under sec. 4269, Stats. (1898), the highest market value of the timber, in whatever place or condition, while in defendants' possession.

Appeal from a judgment of the circuit court for Langlade county: John Goodland, Circuit Judge. *Reversed.*

The appeal is from a judgment rendered in an action of trespass by cutting timber.

For the appellant there was a brief by *Goodrick & Goodrick,* and oral argument by *A. B. Goodrick.* They cited, among other authorities, *Brown v. Bosworth,* 58 Wis. 379, 17 N. W. 241; *Underwood v. Paine L. Co.* 79 Wis. 592, 48 N. W. 673; *St. Croix L. & L. Co. v. Ritchie,* 78 Wis. 492, 47 N. W. 657; *Cook L., C. & P. Co. v. Oconto Co.* 134 Wis. 426, 114 N. W. 823; *Schweitzer v. Connor,* 57 Wis. 177, 14 N. W. 922; *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 85 N. W. 1036.

O. G. Erickson, for the respondents.

Timlin, J. Error is assigned upon the refusal of the trial court to instruct the jury that if the defendants or either of them knew, or by the exercise of reasonable care and diligence might have ascertained, the location of the government quarter-post between sections 20 and 21, it was their duty to have done so, and in instructing the jury that if they believed the testimony of the defendant *Borth* the defendants were not negligent, and in instructing the jury that the burden of proof with reference to the fourth question of the special verdict rested upon the plaintiff. It was

not controverted that the plaintiff was the owner of the land from which the timber was cut by defendants, and the jury found the amount of timber cut and removed—the stumpage value to be $268.79, the manufactured value while in defendants' possession to be $523.94; and the fourth question and its answer is as follows: "Was said timber cut from said lands by mistake? Answer. Yes." The refusal of the foregoing instructions requested, and the giving of the foregoing instructions excepted to, were very questionable rulings. *Brown v. Bosworth,* 58 Wis. 379, 17 N. W. 241; *Arpin v. Burch,* 68 Wis. 619, 32 N. W. 681; *Underwood v. Paine L. Co.* 79 Wis. 592, 48 N. W. 673.

But we do not find it necessary to pass upon these questions, because the instructions refused and given relate to that part of the charge only applicable to the fourth question of the special verdict above quoted. With reference to this fourth question, the more comprehensive error is assigned that the court should have changed the affirmative answer of the jury to a negative, and upon the verdict so amended, and pursuant to sec. 4269, Stats. (1898), have rendered judgment for the larger value found by the jury. The only evidence to support the answer of the jury above quoted was given by Larzelere, the surveyor, and the defendant *Borth. Borth* testified that defendants employed Larzelere to run the north and south section line between sections 20 and 21, on the east side of which line lay the land of the plaintiff, and on the west side the land of the defendants. The defendant *Borth,* acting for both defendants, instructed Larzelere to get the field-notes and be sure and run the line right. Larzelere ran a straight line, commencing at the common section corner of sections 20, 21, 28, and 29 north, to the common section corner of sections 20, 21, 17, and 16. He did not find any quarter-post and did not finish his work. He was sent away by *Borth* to the town of Neva to do some surveying, notwithstanding he told *Borth* he had not corrected up that survey and that it ought to be corrected up

before he left it. *Borth* replied that they would not get over the line until Larzelere came back and corrected it up, and Larzelere did not come back and was not called back. Larzelere looked a good deal for the quarter-post, but did not find it at that time. The quarter-post was since found, and was twelve or fourteen rods west of the center of a straight line between the section corners above mentioned. He did not establish a quarter-post because he understood from *Borth* that the quarter-post was there and thought they would find it later on. When he came out correctly at the north end of his line he said there was no reason for correcting the line. He merely established the center between corner and corner and blazed the line he established and marked it out for the correct line, and he abandoned a further search for the quarter-post because the defendant sent him elsewhere to do some surveying. The defendant *Borth* testified in partial corroboration of this, but denied part, and added to the foregoing testimony as follows: Larzelere told him they could not find the quarter-post, and had looked for it some time, and *Borth* replied: "Well, if the quarter-post is not there, you've got the field-notes." Larzelere told *Borth* the line was all right to cut by. *Borth* had seen the witness trees of the quarter-post a couple of years before this, but whether it was on the line he could not say. It might have been on the line made by Larzelere. He (*Borth*) at one time ran up the line from the south to the quarter-post. There were three different lines, and he took the one farthest east from the south section corner and did not find any quarter-post there, but looked around and went west and found the two witness trees. He presumed they were there now. It was meant to be the quarter-post according to the field-notes. He reiterated that Larzelere told him the line as marked by Larzelere was all right and that he believed it. But he talked about this quarter-post with Larzelere before and after the survey, and told Larzelere about the time the latter ran the lines that he (*Borth*) had seen the

quarter-post, but did not offer to go and show Larzelere where the quarter-post was, nor did he send Larzelere back to look for it. This talk was had in the vicinity of the quarter-post. He could not tell whether he told Larzelere at that time to go over and survey some lands in Neva, but he did so at some time. When Larzelere told *Borth* he had not found the quarter-post, *Borth* said he had seen it. He knew where it was, but it was none of his business, because he was not there surveying, and the quarter-post might have been on the line that Larzelere ran; might have rotted away; but he (*Borth*) knew the line should be run to the quarter-post in order to be right, but did not know whether it was on Larzelere's line or not, and did not go to show Larzelere the location of the quarter-post because he (*Borth*) was too busy; did not try to find it because he was too busy with other work. *Borth* never asked Larzelere to come back and correct up the line because it was not necessary and because Larzelere had told him it was all right. Two or three years before, when *Borth* saw this quarter-post or the witness trees to it, he saw the old lines run by the government, he supposed. There were two different lines, and he took the one farthest east, paced the line from the south section corner halfway across the section, then he went west, and found the witness trees for the quarter-post.

Taking this evidence in its entirety, there is nothing in it to support the verdict of the jury that the cutting was done by mistake, unless it can be considered a mistake where the defendants have positive knowledge of the existence and location of the witness trees to the quarter-post, and that they are at a distance west of a straight line between the section corners and at a distance west of the most easterly line of two lines, and then three years after, when about to cut and remove timber, order a survey by one who has no knowledge of the existence or location of these witness trees. They then fail to point out to him or help him to find the monument, all the time knowing that it determines the loca-

tion of the line and that the surveyor has not found it but has probably passed to the east of it. They knew that Larzelere's line was unfinished and imperfect because he did not find the quarter-post, yet ordered him away to another survey without helping him to find this quarter-post and without giving him, under the circumstances, reasonable opportunity so to do. If this were sufficient it would be very easy to make out a case of mistake under this statute. We think there was no evidence to support the finding of the jury that the cutting was done by mistake. The trial court should have changed the answer to the fourth question from "Yes" to "No," and awarded judgment in favor of the plaintiff for the larger damages found by the verdict and the costs of the action.

By the Court.—Judgment reversed, and the cause remanded with directions to render judgment for the plaintiff for the damages found by the jury in their answer to the third question of the special verdict.

King, Respondent, vs. Graef and another, Appellants.

October 3—October 20, 1908

Sunday: Contracts: Validity: Sale: Delivery and payment on secular day: Warranty of quality.

1. A contract of sale made on Sunday is void and is not susceptible of ratification.
2. An oral agreement for the sale of a carload of potatoes was made on Sunday. On Monday they were delivered and paid for. *Held*, that such delivery and payment were not mere incidents of the Sunday transaction, but in themselves constituted a complete contract of sale and delivery.
3. At the time of the sale of a carload of potatoes in sacks some of the sacks were opened and the potatoes found to be all right. The sacks could not all be opened and examined without the expenditure of much time. There was evidence that the vendors represented to the vendee that the rest of the potatoes were as

good as those examined and that the vendee relied on such representation and paid for the potatoes, but upon promptly unloading the car found that about 100 bushels had been frozen, probably in transit. *Held* sufficient to warrant a finding by the jury that there was an express warranty and a breach thereof.

4. In such a case, if there had been no express warranty, the vendee might recover for breach of an implied warranty of quality.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This action was brought to recover damages for breach of warranty. The defendants shipped a carload of potatoes from Hortonville to Watertown in February, 1906, the car arriving at its destination on Sunday morning, February 9th. During the day the agent of the defendants, who was in charge of the car, made an oral agreement with the plaintiff, whereby he agreed to sell the plaintiff the carload of potatoes at fifty-eight cents per bushel. The evidence further tended to show that the agent represented that the car of potatoes sold was as good in every respect as other potatoes formerly sold by the defendants to the plaintiff, and that the potatoes formerly sold were a good, merchantable article. Nothing more was done by the parties on Sunday, but on Monday morning the potatoes in the car were weighed, some twenty sacks in the car were opened and examined, and the potatoes were delivered to the plaintiff and were paid for by him without any further examination, or without any opportunity to examine them, except by unloading them from the car and opening the sacks. The testimony also tended to show that on Monday the agent in charge of the potatoes represented to the plaintiff that all of the potatoes in the car were as good in quality as those examined, and that plaintiff relied on such statement. Upon unloading the car it was found that 100 bushels of the potatoes contained therein were frozen, and the evidence tended to show that they were frozen in transit, probably because of an accident to the car at Fond du Lac. On February 13th the plaintiff notified the defendants of the condition of the potatoes and demanded

settlement for the worthless potatoes found in the car. Payment was refused and this action was brought, which resulted in a trial and judgment for the plaintiff for damages sustained by reason of the potatoes in the car being frozen, from which judgment this appeal is taken.

Two errors are alleged: (1) That the contract was made on Sunday and is therefore void and cannot furnish any basis for recovery in any action; (2) that no express or implied warranty followed the sale in any event, and that therefore the plaintiff could not recover.

For the appellants the cause was submitted on the brief of *A. M. Spencer.*

For the respondent there was a brief by *Giles H. Putnam* and *Gustav Buchheit,* and oral argument by *Mr. Putnam.* They cited *Taylor v. Young,* 61 Wis. 314; *Harrison v. Colton,* 31 Iowa, 16; *Adams v. Gay,* 19 Vt. 358; *Butler v. Lee,* 11 Ala. 885.

Barnes, J. It is well settled that contracts made in violation of the statute forbidding the doing of any business on Sunday are void and cannot be made the basis of a recovery in the law. *Pearson v. Kelly,* 122 Wis. 660, 664, 100 N. W. 1064; *Vinz v. Beatty,* 61 Wis. 645, 21 N. W. 787; *Thomas v. Hatch,* 53 Wis. 296, 10 N. W. 393; *Howe v. Ballard,* 113 Wis. 375, 89 N. W. 136; *Brown v. Gates,* 120 Wis. 349, 97 N. W. 221, 98 N. W. 205. Neither can a contract made on Sunday be validated by proving acts tending to show a ratification, because such a contract is void and is not susceptible of ratification. *Jacobson v. Bentzler,* 127 Wis. 566, 107 N. W. 7; *Troewert v. Decker,* 51 Wis. 46, 8 N. W. 26; *Brown v. Gates, supra; Vinz v. Beatty, supra; Sherry v. Madler,* 123 Wis. 621, 101 N. W. 1095. If the acts done on Monday were mere incidents to the Sunday transaction they would not save it from the condemnation of the statute. *Jacobson v. Bentzler, supra.* It follows that, in determining the rights of the parties here, the Sunday

transaction must be eliminated from consideration. In this case the potatoes were not weighed nor delivered until Monday and no part of the purchase price was paid until Monday. The agreement of Sunday was void under the statute of frauds (sec. 2308, Stats. 1898), even if it were not subject to any other infirmity. It might, of course, if made on a secular day, be validated by partial or complete performance. It was perfectly lawful for the defendants to deliver, and for the plaintiff to pay for, a carload of potatoes on Monday. These acts were not mere incidents to the transaction on Sunday, but comprehended all the elements necessary to make a complete contract in itself. If the potatoes had been delivered on credit the Sunday agreement would not govern as to price, but the defendant could recover on *quantum meruit.* The case is akin to an agreement for hire made on Sunday. The employee may not recover the contract price for his work, but he is entitled to recover what it is reasonably worth. *Pearson v. Kelly, supra; Thomas v. Hatch, supra.*

In *Taylor v. Young,* 61 Wis. 314, 21 N. W. 408, a settlement was agreed upon on Sunday for trespass done by live stock. The consideration was paid on a week day and was retained by the claimants. The court held that the settlement, being fully performed on a week day, was valid. So, too, it was held in *Vinz v. Beatty, supra,* that while a lease of premises made on Sunday was void and incapable of ratification, subsequent occupancy and payment of rent by the lessee created a tenancy, the terms of which would depend upon a contract to be implied from the acts of the parties. The delivery of the potatoes on Monday, coupled with the fact that a consideration was paid for them, was tantamount to a sale on that day, and the payment and receipt of a sum of money for such potatoes was tantamount to an agreement upon the price to be paid, and the conclusion therefore follows that the transaction on Monday constituted a complete contract of sale and delivery.

The testimony showed that, at the time of the delivery of the potatoes, they were in sacks; that some of the sacks were opened and the potatoes were found to be all right; that all of them could not be examined without unloading the car and opening the sacks, which work would necessitate a considerable expenditure of time—much more, perhaps, than the agent who made the sale desired to spend at Watertown; and that plaintiff promptly unloaded the car and found that 100 bushels of the potatoes had been frozen, probably while in transit. A claim for damages was promptly made. The testimony further showed that at the time the twenty sacks of potatoes were opened and examined, the agent of the defendants represented to the plaintiff that the rest of the potatoes in the car were as good as those examined, and that plaintiff relied upon such representation. This evidence was sufficient to warrant a finding of the jury that there was an express warranty of the potatoes sold and delivered and that they did not conform to such warranty. If plaintiff were compelled to rely upon an implied warranty, we still think he was entitled to recover under the rule in *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785.

By the Court.—Judgment affirmed.

The State vs. Morrin.

October 3—October 20, 1908.

Indians: Abrogation of treaties: Right to hunt and fish: Subjection to state laws.

1. Congress has power to abrogate the provisions of an Indian treaty.
2. The act of Congress admitting Wisconsin into the Union on an equal footing with the other states abrogated the stipulations of the treaty of March 28, 1843, with the Chippewa Indians respecting their right to hunt and fish within the borders of the state, so that they were thereafter subject to the laws of the

state in that regard; and the treaty of September 30, 1854, giving to the Indians residing in the territory thereby ceded the right to hunt and fish therein, does not operate to exempt from the state laws an Indian who, under the act of Congress of February 8, 1887, has become a citizen of the United States and of this state.

EXCEPTIONS from the circuit court for Ashland county: E. RAY STEVENS, Judge. *Overruled.*

On August 16, 1907, the defendant was convicted, under ch. 489, Laws of 1905, and the acts amendatory thereof, of setting, placing, using, and causing to be set, placed, and used, gill nets and pond nets for trapping fish in the waters of Lake Superior along the south shore thereof and within one mile of the main shore of said Lake Superior, said nets not being minnow seines not more than twenty feet in length or five feet in depth, or minnow dip nets not more than six feet in diameter. The information charges that defendant violated the provisions of the law above described.

The case was tried upon a stipulated statement of facts, which set out that the defendant is a Chippewa Indian, born within the jurisdiction of the United States and residing within the territory ceded by the Chippewa Indians of Lake Superior and the Mississippi to the United States under a treaty of September 30, 1854 (10 U. S. Stats. at Large, 1109). He became a citizen of the United States by virtue of sec. 6 of the act of Congress of February 8, 1887 (24 U. S. Stats. at Large, 390, ch. 119), and for more than five years last past has exercised the rights of a citizen and has voted at elections in Bayfield county during that period. It is agreed that defendant used the nets seized in this action and that he set them in the outlying waters of Lake Superior, in Red Cliff Bay, within one mile of the shore line of Bayfield county. Defendant does not reside within the boundaries of any Indian reservation, but resides in the village of Bayfield, Bayfield county, where he owns real estate upon which he pays taxes. The treaty under the provisions of

which the defendant claims exemption from the fishing laws of Wisconsin provides that such of the Indians as resided in the territory ceded therein should "have the right to hunt and fish therein until otherwise ordered by the President."

The court refused to direct a verdict in favor of defendant upon the stipulated facts and he was found guilty. The case is certified to this court under sec. 4720, Stats. (1898), upon summary exceptions to the court's rulings.

The cause was submitted for the plaintiff on the brief of the *Attorney General* and *A. C. Titus,* first assistant attorney general, and for the defendant on a brief signed by *W. M. Tomkins.*

For the plaintiff it was argued, among other things, that as to the provision for hunting and fishing in such ceded territory contained in the treaty of 1854, made after the state was admitted, the federal government at that time, which was after the admission of the state, had lost jurisdiction—had no power or authority to insert such provision in the treaty, and that such provision is void as against the state or the laws of the state regulating the hunting or catching game and fish. *People v. Bootman,* 180 N. Y. 1, 7, 8; *Geer v. Connecticut,* 161 U. S. 519; *State v. Nergaard,* 124 Wis. 414; *Ward v. Race Horse,* 163 U. S. 504, 507. The state holds title to fish and game within its boundaries as a trustee for the people. *Rossmiller v. State,* 114 Wis. 169, 186; *Roberts v. Fullerton,* 117 Wis. 222. It can neither dispose of such property nor abdicate the trust, nor grant to one person special privileges in relation thereto, and it has never conferred upon the United States authority to control the game and fish within the boundaries of the state nor to grant special privileges or rights in respect thereto either to Indians or others. Authority not conferred on the United States by the federal constitution is reserved by and to the several states.

Counsel for defendant cited *U. S. v. Thomas,* 151 U. S.

577; *Wisconsin v. Hitchcock,* 201 U. S. 202; *Starr v. Campbell,* 208 U. S. 527 (52 L. ed. 602); *Ward v. Race Horse* (dissenting opinion by BROWN, J.), 163 U. S. 504; *Hauenstein v. Lynham,* 100 U. S. 483; *Chew Heong v. U. S.* 112 U. S. 536, 549, 5 Sup. Ct. 255.

SIEBECKER, J. The only question presented is whether the fish and game laws apply to the defendant, a Chippewa Indian, born within the jurisdiction of the United States and residing within the territory ceded by the Chippewa Indians to the United States by the treaty of September 30, 1854. It is urged that the defendant is not subject to the laws of this state because of an article in the treaty proclaimed March 28, 1843 (7 U. S. Stats. at Large, 592, art. 2), respecting this territory, and made between the United States and the Chippewa Indians, which article provides:

"The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force in respect to their trade and intercourse with the whites, until otherwise ordered by Congress."

The treaty of September 30, 1854, provides that those Indians who reside in the territory ceded shall have the right to hunt and fish therein until otherwise ordered by the President.

No claim is made but that this state has the power to regulate the taking of fish from the waters within the boundaries of the state, unless such right was reserved to the national government when the state was admitted into the Union. We deem the question presented in this case has been determined by the following decisions of the federal supreme court: *Ward v. Race Horse,* 163 U. S. 504, 16 Sup. Ct. 1076; *Dick v. U. S.* 208 U. S. 340, 28 Sup. Ct. 399; *Geer v. Connecticut,* 161 U. S. 519, 16 Sup. Ct. 600.

The power of Congress to abrogate treaties with Indians was declared in the case of *Lone Wolf v. Hitchcock,* 187 U. S. 553, 23 Sup. Ct. 216. It is there held:

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."

In *Ward v. Race Horse, supra,* it is held that an act of Congress which admits a state into the Union, and declares without reservation that such state shall have all the powers of the other states of the Union, is an abrogation of a previous treaty stipulation with Indians within the territory of such state respecting their right to fish and hunt. The court holds that to exempt such Indians from state laws regulating hunting and fishing within the borders of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into the Union on an equal footing with the original states, upon the ground that a treaty with the national government giving the right to hunt and fish within territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby. The instant case presents such a situation, and it follows that the stipulations in the treaty with the Chippewa Indians respecting their right to hunt and fish within the borders of this state were abrogated by the act of Congress admitting the state into the Union and making no reservation as to such rights.

It also appears under the facts that the defendant has become a citizen of the United States by virtue of and pursuant to sec. 6 of the act of Congress of February 8, 1887. Under the provisions of this act an Indian who has received an allot-

ment and patent for land thereby becomes a citizen of the United States and of the state wherein he resides, and is to have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which he may reside. Under these circumstances the defendant has acquired a citizenship in this state. In view of this fact, we cannot perceive how he can claim immunity from the criminal law of this state. His status is like that of every other citizen, and subjects him to penalties for the violation of any state law. *Matter of Heff,* 197 U. S. 488, 25 Sup. Ct. 506, and cases there cited. We are of the opinion that the defendant was legally convicted of the offense charged.

By the Court.—The exceptions of the defendant are overruled, and the cause remanded with directions to the circuit court to proceed to judgment against the defendant.

GOYKE, Plaintiff in error, vs. THE STATE, Defendant in error.

October 3—October 20, 1908.

Bastardy: Nature of proceedings: Jurisdiction: Circuit and municipal courts in Winnebago county: Change of venue.

1. A bastardy proceeding, though purely statutory and strictly neither a criminal nor a civil action, has characteristics of both and is comprehended within the term "matters civil and criminal" as used in sec. 8, art. VII, Const., giving to the circuit courts original jurisdiction in all such matters not prohibited by law.
2. A bastardy proceeding is not a criminal action within the meaning of that term as used in ch. 24, Laws of 1895, creating the municipal court of the city of Oshkosh and county of Winnebago.
3. Ch. 24, Laws of 1895, confers exclusive jurisdiction of bastardy proceedings upon the municipal court of the city of Oshkosh and county of Winnebago, and by implication prohibits the ex-

ercise of original jurisdiction in such matters by the circuit court for Winnebago county.

4. The right to a change of the place of trial from one court to another is statutory and can be enjoyed only as prescribed by the written law.
5. Ch. 24, Laws of 1895, provides for a change of venue from the municipal court of the city of Oshkosh and county of Winnebago in criminal cases only; and a change of venue from that court in a bastardy case cannot confer jurisdiction upon the circuit court for Winnebago county, even though the change is made upon the application of the accused and he thereafter submits without objection to trial in the circuit court.
6. Where a court does not have jurisdiction of the subject matter of an action, mere submission thereto does not confer such jurisdiction, and if the court proceeds to trial and judgment the judgment is void.

TIMLIN and BARNES, JJ., dissent.

ERROR to review a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The action was against the plaintiff in error on the charge of his being the father of a bastard child. It was commenced in the municipal court of the city of Oshkosh and county of Winnebago. A motion was made therein before a jury was called for the trial for a change of the place thereof to the circuit court for Winnebago county; such motion being based upon affidavit of the accused that he believed he could not obtain a fair and impartial trial in said municipal court. The motion was granted. The cause was tried in said circuit court, resulting in a verdict of guilty. Thereupon a motion was made in arrest of judgment upon the ground that the court had no jurisdiction of the subject matter and no judgment could lawfully be rendered therein against the accused. The motion was denied. Final judgment was thereupon rendered against the accused.

For the plaintiff in error there was a brief by *Earl P. Finch,* attorney, and *Wilbur E. Hurlbut,* of counsel, and oral argument by *Mr. Hurlbut.*

For the defendant in error the cause was submitted on the

brief of the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *W. J. Foulkes,* district attorney.

MARSHALL, J. The municipal court of the city of Oshkosh and county of Winnebago was created by ch. 24, Laws of 1895. The act treated criminal cases as not including bastardy proceedings, which was in strict conformity to the decisions of this court. *State v. Mushied,* 12 Wis. 561; *State v. Jager,* 19 Wis. 235; *Baker v. State,* 65 Wis. 50, 26 N. W. 167; *Pierstoff v. Jorges,* 86 Wis. 128, 56 N. W. 735; *Barry v. Niessen,* 114 Wis. 256, 90 N. W. 166; *Meyer v. Meyer,* 123 Wis. 538, 102 N. W. 52. Those cases are to the effect that a bastardy proceeding is purely statutory and not classible either with criminal or civil cases in the general sense of those terms. It has characteristics of both, and as to such as are similar to those of criminal actions the rules and practice therein are applicable, and as to such as are the same or similar to those of civil actions the rules and practice therein are applicable. Wherein it approaches nearer to the one or to the other class is indicated in the decisions and need not be particularly referred to here. It is sufficient for now that a bastardy proceeding is not a criminal action within the meaning of that term as used in the law creating the court in question.

The act of 1895 purported, by implication, to take away from the circuit court for Winnebago county original jurisdiction of bastardy actions by conferring exclusive jurisdiction in that regard upon the new court. The language in respect to the matter is very plain. There is no controversy as to its import. Therefore, we need not quote or discuss the provisions.

Sec. 8, art. VII, of the constitution provides that "the circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law." The act of

the legislature in creating the municipal court in question, within the meaning of the quoted language, was a prohibition by law of the exercise of original jurisdiction by the circuit court for Winnebago county in bastardy matters.

Notwithstanding language used in *Bookhout v. State,* 66 Wis. 415, 28 N. W. 179, it seems that while a bastardy proceeding is neither strictly a criminal nor a civil action it is comprehended in the combination of terms "civil and criminal" actions as used in the constitution, since only such actions are known to our system. Secs. 2594–2600, Stats. (1898). That case must be read as holding that jurisdiction to try this class of actions may be and was by the law of 1895 legitimately vested exclusively in the court created thereby.

It follows that unless there is some provision in the act of 1895, or some other written law authorizing jurisdiction in such cases as this to be acquired by the circuit court for Winnebago county by change of venue, it did not obtain any jurisdiction of the subject matter here involved by the proceedings resorted to for that purpose. The only written law referred to other than the act of 1895 is sec. 1533*a,* Stats. (1898). That deals with the subject of changing the venue in bastardy cases from one county to an adjoining county upon proof by affidavit that the accused cannot have a fair and impartial trial in the former. Obviously that does not satisfy this case. There was no such affidavit nor any such change of venue asked for or granted.

The act of 1895 provides for a change of venue in criminal cases only, plainly using the term in the same sense as in the preceding part of the law conferring jurisdiction in such cases, *i. e.* as the name of a class not including bastardy cases. As to such class a change is provided for upon "the affidavit of the accused that he believes he cannot obtain a fair and impartial trial in said municipal court." Such an affidavit was made in this case, but, obviously, from what has been said it was not legitimately used.

We have proceeded to this point upon the assumption that the right to a change of the place of trial from one court to another is statutory and can be enjoyed only as prescribed by the written law. The rule in that respect, we apprehend, is too familiar to require extended discussion. *Wheeler v. State,* 24 Wis. 52; *Montgomery v. Scott,* 32 Wis. 249; *State v. Rowan,* 35 Wis. 303; *Carpenter v. Shepardson,* 43 Wis. 406; *Garland v. McKittrick,* 52 Wis. 261, 9 N. W. 160; *Baker v. State,* 56 Wis. 568, 14 N. W. 718.

It might be thought that since the accused here applied for the change which was granted and appeared and submitted without objection to trial in the circuit court, he should be held to have waived the question now presented. That might be so if the circuit court had jurisdiction to try such cases and the court of first instance consented to part with its jurisdiction, so that the difficulty consisted only in failure to follow a statutory method of invoking the new jurisdiction, as was the case in *Carpenter v. Shepardson, supra,* and *Montgomery v. Scott, supra.*

When a court does not have jurisdiction of such subjects as the one involved in the action improperly brought before it, mere submission thereto does not confer jurisdiction of the subject matter, and if the court proceeds to trial and judgment the judgment is void. *Dykeman v. Budd,* 3 Wis. 640; *Foster v. Bacon,* 9 Wis. 345; *Hewitt v. Follett,* 51 Wis. 264, 8 N. W. 177; *Bullard v. Kuhl,* 54 Wis. 544, 11 N. W. 801; *Plano Mfg. Co. v. Rasey,* 69 Wis. 246, 34 N. W. 85. In *Dykeman v. Budd, supra,* and *Plano Mfg. Co. v. Rasey, supra,* the precise question discussed at this point was passed upon, it being held that where exclusive jurisdiction is in one court as to the trial of a particular class of actions another court cannot by consent of parties or in any manner acquire or legitimately exercise such jurisdiction.

The rule that the general jurisdiction of circuit courts is by implication "prohibited by law" within the meaning of the constitution, when jurisdiction has been in terms or by

necessary implication conferred upon some other court, is illustrated by *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704, and *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304. It was there decided that the legislature by conferring jurisdiction as to the settlement of estates on county courts evinced a policy that matters appertaining thereto should be adjudicated in such courts, so far as an adequate remedy is there afforded, superseding the jurisdiction of circuit courts, and that in case of a circuit court exercising such jurisdiction it should be regarded as having committed jurisdictional error, not waivable by the parties and fatal to the result upon the case coming here for review, regardless of whether the question is raised by objection.

It follows from the foregoing that the judgment of the circuit court for Winnebago county must be reversed and the cause be remanded thereto, with directions to remit the record to the municipal court of the city of Oshkosh and county of Winnebago for further proceedings therein according to law.

By the Court.—So ordered.

Timlin, J. (*dissenting*). Statutes providing a proceeding for ascertaining the paternity of bastard children and compelling the father to support such children have been in force in this state since the creation of the state, and are collected, revised, and brought forward in ch. 64, Stats. (1898). Whatever steps of procedure therein are not explicitly covered by the statutes have been built up by the courts in the decision of particular cases, and in this way the proceeding has been judicially defined as not a criminal but a *quasi*-criminal prosecution. *Baker v. State,* 65 Wis. 50, 26 N. W. 167; *State v. Mushied,* 12 Wis. 561.

The instant case comes before this court by writ of error to the circuit court for Winnebago county, in which court the case was tried on its merits and defendant found guilty

and convicted. The action was commenced in the municipal court of the city of Oshkosh and county of Winnebago on November 1, 1905, by the issue of a warrant. April 11, 1906, the defendant was in court and duly arraigned. He obtained a short adjournment, and on April 20, 1906, the case was called, testimony was taken on the part of the complainant, the defendant offered no evidence, and the accused was bound over by that court to the same court for trial as required by statute. Ch. 24, Laws of 1895. The trial was called on May 10, 1906, the defendant was arraigned and pleaded not guilty, and the remainder of the record before us is as follows:

"Defendant filed an affidavit for change of venue to circuit court, Winnebago county, Wisconsin. Defendant filed written motion for change of venue to circuit court, Winnebago county, Wisconsin. Motion granted. Order for change of venue filed upon the affidavit of defendant, and upon motion of his attorney and upon all the records and files the court thereupon ordered that the venue of the cause be changed to the circuit court for Winnebago county, Wisconsin."

A copy of the affidavit annexed to the return from the municipal court to the circuit court states that the affidavit is made for the purpose of moving the court for an order changing the venue in said action to the circuit court for Winnebago county. Copy of the written motion referred to expressly requests a change of the venue to the circuit court for Winnebago county, and the order of the municipal judge is made on this affidavit and on this written motion. The case was then tried on its merits in the circuit court, to which it was thus removed by the accused, without motion to remand or other objection, and after verdict against him the accused brought this writ of error to the supreme court, averring that the circuit court for Winnebago county had no jurisdiction to entertain the cause which he himself brought there in the manner aforesaid.

The constitution of this state gives to the circuit courts of

this state "original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law." Sec. 8, art. VII. The jurisdiction of the circuit court over bastardy cases is neither excepted in the constitution nor prohibited by law. I can find nothing in ch. 24, Laws of 1895, which prohibits the exercise of this jurisdiction by the circuit court. The most that can fairly be said of this statute is that it prohibits the exercise in such cases by justices of the peace or court commissioners of the ordinary power to bind over for trial, and vests this kind of jurisdiction in the judge of the municipal court. It then requires this judge to certify and return—that is, to bind over for trial—the person accused of bastardy either to his own court or to another designated municipal court of the same county. There is nothing in the act stating expressly or by implication that this jurisdiction to hear and determine a bastardy case is exclusive or that the jurisdiction of the circuit court is taken away. There is merely no provision for binding over the accused to the circuit court, and another court designated to which the case shall be certified and returned. It has been held that the jurisdiction of circuit courts is not affected by a statute which confers jurisdiction upon other courts by requiring the accused to be bound over for trial to another court and contains no other language prohibiting the circuit court from trying the cause. See *State v. Grunke,* 88 Wis. 159, 59 N. W. 452, referring to sec. 2420, Stats. (1898); *Allen v. State,* 5 Wis. 329.

The act in question provides that the municipal court may exercise power and jurisdiction equal and concurrent with the circuit court for Winnebago county in all cases of crimes and misdemeanors arising in said county except murder, and except where the person accused shall demand in writing to be tried in the circuit court. It also vests in the municipal court all the powers and jurisdiction of justices of the peace in criminal actions and proceedings and in civil actions and

proceedings. I cannot think that a mere provision of statute that a person accused of bastardy shall be bound over to a municipal court prohibits the circuit court from exercising jurisdiction or takes away its jurisdiction of that subject matter. The situation here presented is that of one expressly and voluntarily removing his cause for trial into a court of general jurisdiction, but removing it into that court by a procedure not authorized by statute, then trying it on its merits in the court in which he has so removed it, and afterward objecting that that court has not jurisdiction. I think this should not be permitted, and I regret that a rule of procedure contrary to ethics, and as I believe contrary to law, should receive the sanction of this court. No legislative body would establish such a rule. The immorality of the rule would there be sufficient to defeat it. Courts are led to sanction such unjust rules by imagining themselves bound and controlled by a sort of verbal logic derived from former sayings of that court. This self-inflicted spell would be amusing were its consequences not so serious.

It is true that consent cannot confer jurisdiction of the subject matter. But this is not such a case. The circuit court for Winnebago county had jurisdiction of the subject matter. It could at least hear and determine bastardy cases which might have been brought to it by change of venue from another circuit court of this state. It had jurisdiction over the subject. It had the power to hear and determine any bastardy case, provided it was properly brought before the court. The defect here complained of was one of procedure, in that the judge of the municipal court, upon the affidavit and request of the accused, transmitted the cause for trial to the circuit court for Winnebago county, when he perhaps should have either refused to transmit the case at all or transmitted it to the municipal court of Neenah and Menasha in the same county. The case was therefore brought to the circuit court and tried there by consent of and at the request

of the accused. This should conclude him from attacking the judgment of that court for want of jurisdiction.

There is a rule which commends itself to me as sound, which was applied by Judge Brewer in *Shuster v. Finan,* 19 Kan. 114, to the effect that, where one brings in an unauthorized manner a cause before a court of general jurisdiction, this is a consent which waives all objection. Or, to quote the words of Elliott, C. J., in *Tucker v. Sellers,* 130 Ind. 514, 30 N. E. 531: "Jurisdiction of a particular instance falling within the scope of the general subject may be given by consent, either express or implied." Other instances could no doubt be found.

The following opinion was filed November 10, 1908:

Barnes, J. (*dissenting*). Mankind is sometimes prone to emphasize the correctness of conclusions reached after much doubt and hesitation by the use of positive and often extravagant language.

It seems to be conceded in the opinion of the court that under the authority of *Carpenter v. Shepardson,* 43 Wis. 406, and *Montgomery v. Scott,* 32 Wis. 249, the circuit court obtained jurisdiction of the person of the defendant by reason of his filing an affidavit in the municipal court stating that he could not have a fair trial therein and demanding that his cause be sent to the circuit court for trial, and by virtue of his appearing in the latter court without objection and defending his cause therein. The doctrine of these cases is amplified and supplemented by *Rindskopf v. State,* 34 Wis. 217; *Jerdee v. State,* 36 Wis. 170; *State v. Homey,* 44 Wis. 615; *Baker v. State,* 56 Wis. 568, 14 N. W. 718; and by sec. 2643, Stats. (1898), providing for voluntary appearance in civil actions.

But the judgment is reversed because the circuit court had no jurisdiction of the subject matter of the action. If it is

a fact that there was a lack of jurisdiction in the trial court, its proceedings were *coram non judice,* and the conclusion of this court is manifestly correct, although it appears that the defendant has had a fair trial, not a single exception or objection being called to our attention aside from the jurisdictional question. It is urged that the circuit court was by implication deprived of jurisdiction to try bastardy actions because exclusive jurisdiction of such actions was conferred upon the municipal court created by ch. 24, Laws of 1895, and it is said that: "The language in respect to the matter is very plain. There is no controversy as to its import. Therefore we need not quote or discuss the provisions." In support of the conclusion that the circuit court was deprived of jurisdiction by ch. 24, Laws of 1895, *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704, and *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304, are cited.

I think it is far from being plain that exclusive jurisdiction, or in fact any jurisdiction at all, in bastardy actions, is conferred on the municipal court. There is not a word in the act directly conferring such jurisdiction. It is only by a somewhat far-fetched implication that it is conferred at all. The act provides that the preliminary examinations held by the examining magistrates shall be certified and returned either to said municipal court or to the municipal court of Neenah and Menasha. The act is silent as to what shall be done when the examinations are so certified. It does not say that the municipal court shall try such actions. It would seem that, as to an inferior court created by statute and dependent upon statute law for its powers, the language of the act defining its powers should define them with accuracy and certainty, rather than that they should be supplied by doubtful implication. It is probably true that the legislature intended that this court should have jurisdiction to try bastardy actions, but it has not said so. There is no express provision in the statute under discussion which deprives the

circuit court of its general jurisdiction to try bastardy actions that are properly before it. There is no language therein from which a withdrawal of such jurisdiction can be inferred, except the provision to the effect that preliminary examinations shall be certified and returned to one of the two municipal courts of the county. In the present case two implications must necessarily be drawn to deprive the circuit court of jurisdiction: one that the legislature intended to confer jurisdiction in such cases upon the municipal court, and the other that it intended to deprive the circuit court of any jurisdiction over them.

In support of the view that the circuit court has been deprived of jurisdiction, it is said that general jurisdiction was conferred on county courts over matters within the jurisdiction of the circuit courts before county courts were created; that the law creating county courts did not, by its express provisions, deprive the circuit courts of their former jurisdiction, but that such law in effect and by implication made the jurisdiction of the county courts exclusive. The cases of *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704, and *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304, are cited in support of this view. The comparison is apt and appropriate, but I do not think the decided cases sustain the view adopted by the court. In *Meyer v. Garthwaite* the court said:

"It seems to be settled in this state that the circuit court, as a court of equity, has a general, original jurisdiction over matters arising in the administration of estates concurrent with the county courts. 1 Pom. Eq. Jur. §§ 346–351; *Glascott v. Warner,* 20 Wis. 654; *Tryon v. Farnsworth,* 30 Wis. 577; *Brook v. Chappell,* 34 Wis. 405; *Catlin v. Wheeler,* 49 Wis. 507, 520, 5 N. W. 935. Yet that jurisdiction is practically suspended to this extent: that the circuit court will decline to take jurisdiction over such matters unless such special facts appear as show that a complete and adequate remedy cannot be given by the county court."

In *Burnham v. Norton* the court said:

"It is too well settled to require discussion here that circuit courts, by virtue of their general equity powers, with some exceptions, have original jurisdiction concurrent with county courts over matters pertaining to the settlement of the estates of deceased persons (*Tryon v. Farnsworth,* 30 Wis. 577), though, where such concurrence exists, generally speaking, that of the county courts is held to supersede that of the circuit courts, so that the latter should decline to exercise such jurisdiction in the absence of special facts or circumstances rendering the power of the county courts not sufficiently broad and comprehensive to furnish as complete and sufficient a remedy as that to be found in the circuit courts."

These cases do not show any lack of jurisdiction in the circuit courts. On the contrary, they show that they have jurisdiction, but jurisdiction they should ordinarily refuse to exercise. They are in harmony with *Catlin v. Wheeler,* 49 Wis. 507, 520, 5 N. W. 935, in which it is said:

"It has already been decided by this court that county courts have jurisdiction in such matters concurrent with the circuit court, or court of chancery proper, by force of the statute; but it will require the *strongest, clearest,* and *most unequivocal language* of the statute *to make such a jurisdiction* of the county courts in probate *exclusive,* and no such language is found in the present statute."

The cases of *Glascott v. Warner,* 20 Wis. 654; *Brook v. Chappell,* 34 Wis. 405; and *Catlin v. Wheeler, supra,* all hold that the statute conferring certain powers on county courts theretofore exercised by the circuit courts did not deprive the circuit courts of any jurisdiction, in the absence of language expressly taking away such jurisdiction. The assumption that such courts could be deprived of jurisdiction by a mere implication that might be drawn was repudiated.

There is no warrant for saying that jurisdiction in probate matters is still vested in the circuit courts but the right to exercise it has been taken away. This is equivalent to say-

ing that these courts have been deprived of jurisdiction. The statutes do not provide for suspended animation. The learned judge who wrote *Burnham v. Norton* has too much respect for precedent to desire to overrule the numerous prior decisions of this court, not only holding that circuit courts had concurrent jurisdiction with county courts, but also holding that they had the right to exercise such jurisdiction if they saw fit.

Applying to ch. 24, Laws of 1895, the same construction which the court has uniformly applied to the acts conferring jurisdiction on county courts, and assuming that the municipal court of Winnebago county had jurisdiction to try bastardy cases, I think the circuit court had concurrent jurisdiction of the subject matter of the case under consideration, as well as of the person.

The bastardy act, being in derogation of the common law, was treated by the courts after its adoption as though it were an encroachment upon the prerogatives of certain male members of the human family. Paternity had to be proved beyond a reasonable doubt, although the action was in no sense criminal. A discharge by one magistrate after examination was held to be a final adjudication, so that there could be no other examination. *State ex rel. Dilworth v. Braun,* 31 Wis. 600. In this particular the rule adopted was more strict than that applicable to examinations in criminal cases. When we take into account the fact that the only purpose of such a proceeding is to compel the putative father of illegitimate offspring to help contribute to the support of his child, so that it may not become a public charge, no good reason is apparent why a defendant should be fenced around with technical rules calculated to defeat the ends of justice. He is entitled to a fair trial. The defendant here admittedly has had such a trial in a forum of his own choosing; and I think the judgment should be affirmed.

PHALEN, Appellant, vs. HERSHEY LUMBER COMPANY, Respondent.

September 29—November 10, 1908.

Appeal: Review: Findings of fact by referee: Clerical errors: Exceptions: Logging contracts: Driving logs: Payment of damages to riparian owners.

1. A finding of fact by a referee upon conflicting evidence will not be disturbed on appeal unless it is clearly against the preponderance of the evidence.
2. A specific finding of fact should be held to be controlling over another finding which is a mere recapitulation in figures of conclusions from facts previously found, where there is an evident clerical error or discrepancy in such figures.
3. An exception to a finding of fact "except quantity of logs driven and the ownership of the enumerated parts," does not authorize review of the part of the finding relating to the quantity of logs driven.
4. Plaintiff contracted to drive defendant's logs but became financially embarrassed and defendant took up the work and agreed to drive them at a reasonable price to be charged against plaintiff on the contract. During the drive defendant paid certain sums to riparian landowners who threatened to delay or prevent the drive unless damages for overflowing their lands were paid. The referee and trial court found that the danger of serious and prejudicial delay in the driving was apparently real and that the payments were necessarily made in order to enable the defendant to finish the drive within a reasonable time. There was evidence of an understanding between the parties that some such damages would probably have to be paid as a part of the expense of the drive. *Held* that, although there was no legal liability for such damages unless the drive was negligently made, reasonable payments of that nature were properly chargeable against plaintiff.
5. In an action upon a logging contract the evidence is *held* to show that plaintiff left in the woods a greater quantity of logs than that found by the referee, and that the reasonable charges for cutting and banking uncut and skidded logs and the expense of driving the same were considerably less than the amounts found by the referee.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

The plaintiff, a logging contractor, brought this action to recover a balance alleged to be due upon a written logging contract, afterwards modified by parol, as well as certain other sums for logging supplies, labor, and materials alleged to have been furnished to the defendant outside of the terms of the contract. The defendant admitted the execution of the original contract, but denied any modification thereof, and alleged that after partial performance the contract was abandoned by the plaintiff and that defendant was obliged to complete the same. The defendant also pleaded counterclaims for damage resulting from the alleged breach of the logging contract by the plaintiff and claimed an affirmative judgment against him.

The written contract was made October 17, 1899, and provided that during the logging season of 1899 and 1900 the plaintiff should cut, bank, put into Yellow river in Burnett county, Wisconsin, and drive to Nevers dam on the St. Croix river, all pine timber suitable for saw logs upon certain large tracts of land belonging to the defendant in Burnett county and described in the contract for the sum of $5.35 per thousand feet, board measure, the same to be scaled by a scaler to be mutually agreed on, and payments to be made as the work progressed up to the sum of $4 per thousand, the balance to be paid when all the logs were delivered at Nevers dam. Yellow river is a logging stream flowing through Burnett county and emptying into St. Croix river. Plaintiff established a log landing on Yellow river in section 12, town 39, range 15 west, and built a logging camp a few miles north of the landing. The landing was twelve miles below Rice Lake dam and just above a widening of the river called Widespread, which is about four miles long, filled with weeds and floating bog, except a crooked channel about 200 feet wide with little current, and the water is raised for driving purposes by floods from Rice Lake dam. About thirty miles below the landing is Yellow Lake dam, which forms a body of water about ten miles long and two miles wide, through

which it is necessary to boom logs which are being driven. The river empties into the St. Croix about ten miles below Yellow Lake dam, and Nevers dam is still further down on the St. Croix river. In the Widespread and in Yellow Lake driving operations are difficult and much affected by adverse winds.

The logging season of 1899 and 1900 was a fair average season, but there was much adverse wind during the driving season. The plaintiff commenced work in the fall of 1899, and at the end of the hauling season, about April 1, 1900, he had cut and banked 2,866,180 feet, board measure, and had also cut and skidded 1,500,000 feet, and there was left uncut an estimated amount of 100,000 feet. He was financially embarrassed, had insufficient equipment and help, and could not complete his contract. At some time about April 1, 1900, the plaintiff and C. H. Gardner, the defendant's agent in charge of the business, met at the logging camp and discussed the situation. The plaintiff claims that the written contract was then modified by parol agreement between himself and Gardner, to the effect that the defendant would accept the logs banked at the contract price, and excuse the plaintiff from driving them, that the defendant would accept the skidded logs in the woods at $2.50 per thousand, that the defendant should have the use of the plaintiff's dams upon the stream free of charge, and should drive all the logs, charging the plaintiff the reasonable cost of driving. The defendant claims, however, that at about this time the plaintiff was financially unable to proceed with the work, whereupon the defendant took up the work and agreed to drive the logs at a reasonable price to be charged against the plaintiff on the contract, the plaintiff to furnish his teams and driving outfit and the use of his dams, the defendant to return the personal property at the end of the drive.

Upon this question of fact, which was the leading question in the case, the referee found with the defendant's contention. The referee further found that the plaintiff turned over to

the defendant his driving outfit and that defendant drove all the banked logs to Nevers dam; that the whole of Yellow river is difficult for driving purposes, and was particularly difficult in the season of 1899 and 1900 by reason of adverse winds, and that, by reason of damage to adjoining lands along the river caused by the overflows made necessary by the drive, there was great hindrance and expense resulting from the demand and collection of damages by riparian owners; that plaintiff turned over to the defendant his dams at Rice Lake and Yellow Lake, which were necessary for flooding purposes in the drive; that the same were out of repair; that the defendant necessarily spent $457 in repairing them and used them during the seasons of 1900 and 1901, and that one half of the cost of such repairs should be charged to the plaintiff; that in order to make the drive within a reasonable time it was necessary, to the knowledge of the plaintiff, to pay to property owners damages amounting to $635 on account of the flooding of adjoining lands caused by the drive.

By his eleventh finding the referee found that the defendant drove out of Yellow river in the spring of 1900 in all 3,538,070 feet of logs, of which 2,866,180 feet were logs cut and banked by the plaintiff under the contract, 353,330 feet were logs belonging to one Staples, and 318,560 feet were defendant's logs not covered by the contract but cut by other persons; that the entire cost of this drive was as follows:

General expense	$4,293 62
Paid for damages caused by flowing	635 00
One half cost of repairing dams	228 50
Total	$5,157 12

that the amount chargeable to plaintiff of this sum, in proportion to the number of contract logs driven, was $4,177.79, and adding to this $286.61, the cost of driving on the St. Croix, he found a total of $4,464.40 chargeable to the plaintiff, which was the reasonable cost of driving the logs cut and banked by the plaintiff under his contract.

By the twelfth finding it was found that the plaintiff

breached his contract by not banking the logs skidded in the woods and by not cutting all of the timber and by not driving the same; that defendant cut the remaining timber and banked the same together with the skidded logs, the total amount being found to be 1,376,620 feet, and drove the same to Nevers dam in the spring of 1901; that the reasonable expense of this cutting and banking was $2,723.54, and the reasonable cost of driving to Nevers dam was $3,658.71.

By the thirteenth finding it was found that the defendant had suffered damages resulting from plaintiff's default in the sum of $1,500, and by the fourteenth finding that the logging season of 1899 and 1900 ended July 1, 1901, before which date the defendant had driven all the logs left by the plaintiff not driven in 1900.

By the fifteenth finding the credits to the plaintiff and defendant were stated as follows:

Credits to Plaintiff.

2,866,180 feet of logs banked	$15,334 06
1,376,920 feet skidded or not cut	7,364 91
Supplies furn. at deft's request	206 69
87 boom chains	60 00
20 blankets	12 00
600 feet of rope	45 00
One anchor	24 00
One half scaler's wages	207 68
One four-horse team 26 days	78 00
Board and goods furn. deft's agt.	40 65
Sup chg plff. afterwards sold by deft	32 48
2 batteaus not returned	30 00
Total	$23,435 47

Credits to Defendant.

Moneys advanced on logging account in 1899–1900	$13,461 20
Labor and sup. on drive of 1900	4,293 62
One half cost of repairs on dam	228 50
Damages paid chargeable to drive of 1900	635 00
Cost of drive of 1900 on St. Croix	286 61
Cutting and banking uncut and skidded logs	2,753 24
Driving logs, drive of 1901	3,658 71
Damages on account of failure of plff. to perform and complete contract	1,500 00
Total	$26,816 88

By the sixteenth finding it was found that the balance in favor of defendant was the sum of $3,381.41, which became due July 1, 1901. As conclusions of law the referee found that the defendant was entitled to judgment for the last-named sum, with legal interest from July 1, 1901.

The plaintiff filed various exceptions to the findings of the referee, by which he excepted to the conclusion of the referee as to the alleged modification of the contract and as to the plaintiff's inability to carry out the same. He also excepted to the whole of the eleventh finding, "except quantity of logs driven and ownership of the enumerated parts;" to that part of the twelfth finding which fixed the reasonable cost of cutting, banking, and driving the remaining logs in the spring of 1900, and fixing the total amount thereof at 1,376,620 feet; to the whole of the thirteenth finding; to the fifteenth finding as far as it finds the quantity of skidded logs to be 1,376,620 feet, and because it fails to find and allow a number of items claimed by plaintiff for supplies furnished and articles converted by the defendant, and fails to find on the question whether the oral agreement in 1900 included the allowance of a stipulated sum for logs cut and not banked, and whether plaintiff was released from further performance of his written contract. He also excepted to the whole of that part of the fifteenth finding stating the defendant's credits, and to the whole of the sixteenth finding.

The plaintiff also moved to vacate the referee's report for prejudice, for failure to find upon various issues, and because the findings were against the evidence, and also moved, in case the motion to vacate were denied, that the court find on all the issues and modify the referee's report accordingly. The defendant moved for confirmation of the report and for judgment thereon, and all the motions were heard together. The motion to vacate was denied, but the court made additional findings, most of which were simply specific adverse findings as to a number of the claims of the plaintiff which

were not expressly, although impliedly, rejected by the referee. The court, however, struck out three items from the defendant's claim, as follows: The item of $1,500 damages allowed to defendant, the item of $228.50 for one half of the cost of repair of dams, and the sum of $204.14 from the general expense of the drive of 1900. Deducting these items from the amount allowed by the referee, the court ordered judgment for the defendant for $1,449.77, with interest and costs. From judgment in accordance with these findings the plaintiff appeals.

W. F. Bailey, for the appellant.

For the respondent the cause was submitted on the brief of *L. H. Mead.*

WINSLOW, C. J. The errors assigned by the appellant are very numerous and all of them have been carefully examined. Such of them as are not specifically treated in this opinion must be considered as overruled, not as overlooked. The sweeping claim which is made to the effect that the referee's report should have been wholly set aside because of bias, prejudice, refusal to consider evidence, or similar grounds must be rejected without further comment than to say that we have discovered no reason to doubt that the referee, while evidently mistaken as to some of his conclusions, as will appear later, attempted to give the case a fair, conscientious, and painstaking trial. The claim that the referee erred in finding that the oral modification of the written contract alleged by the plaintiff to have been made in the spring of 1900 was not in fact made must also be overruled. Upon this question there was a direct conflict of evidence between the plaintiff on one side and Mr. Gardner, the defendant's agent, upon the other; and, while there was some evidence from other witnesses tending to corroborate the plaintiff's story, still we are unable to say that the referee's conclusion was clearly against the preponderance of the evidence.

Passing from these general claims of error, we proceed to take up the more specific claims in their natural order.

1. There are some very palpable and important discrepancies or contradictions between the referee's eleventh and fifteenth findings of fact which were entirely overlooked by the trial court. By the eleventh finding the referee found that the total amount of logs driven by the defendant in 1900 was 3,538,070 feet (of which 2,866,180 feet were the logs cut and banked by the plaintiff, 353,330 feet were logs belonging to one Staples, and 318,560 feet were defendant's logs cut by others than the plaintiff), and that the total reasonable expense of the whole drive down to the St. Croix river was as follows:

General expense of drive	$4,293 62
Paid for damages to owners of overflowed lands	635 00
Paid one half cost of repairing dams	228 50
Total	$5,157 12

The referee further found in this finding that of this total the plaintiff should be charged with the same proportion as the amount of the logs cut by him bore to the whole amount of logs driven, which proportionate share was found to be $4,177.79. This was manifestly the correct theory on which to determine the proper charge against the plaintiff, but when the referee came to state the credits to be allowed to each party in the fifteenth finding he credited to the defendant the whole expense of the drive of 1900, to wit, $5,157.12, instead of the proportionate amount as determined by the eleventh finding, to wit, $4,177.79. The error here is manifest, and it is equally manifest that the eleventh finding, which is a specific finding of fact, must be held to be controlling over the fifteenth, which is a mere recapitulation in figures of conclusions from the facts previously found. It was evidently a clerical error or discrepancy which should have been corrected without formal exception, but for some reason it remained unnoticed by the court. The court upon review

simply held that two items amounting to $204.14 were improperly included in the general expense of the drive, and that the charge of $228.50 for repairs of dams should not have been allowed, and with these deductions approved the charges for the drive contained in the fifteenth finding. The mere statement of the facts shows the error. The eleventh finding, except so far as its items were changed by the court, must control. Striking out of the expense of the drive the items disallowed by the court, we find that the total cost of the drive of 1900 was $4,724.48 and that the plaintiff's proportionate share thereof was $3,827.21, which should be charged against him, instead of $5,157.12 as charged by the referee, or $4,724.48 as charged by the court. In connection with this item another contention is made, which if sustained would further reduce the amount to be charged against the plaintiff on account of the drive of 1900. It is said that the amount of the Staples logs was 452,000 feet instead of 353,330, and the evidence on the subject, though meager, seems to substantiate the claim. We find, however, no exception which authorizes us to review this finding. In his exceptions to the findings of the referee the plaintiff excepted to the eleventh finding of fact, "except quantity of logs driven and the ownership of the enumerated parts," thus specifically omitting to find any fault with the finding as to the quantity of logs driven. We find no other exception in the record which raises this question, hence we conclude that it is not now open.

2. It is claimed that the item of $635 for damages paid by the defendant to a number of riparian landowners should not have been allowed. The referee found that these payments were necessarily made in order to enable the defendant to finish the drive within a reasonable time. The testimony in support of the item is to the effect that, after the logs had reached Yellow Lake, the defendant was threatened by a number of landowners that, unless damages for the overflow-

ing of their lands were paid them before the logs got through the lake, they would cut the booms or tear out the dam, and that under the stress of these threats the sums were paid. It is quite true that there was no legal liability for such damages unless the drive was negligently made (*Field v. Apple River L. D. Co.* 67 Wis. 569, 31 N. W. 17), and we have had some doubt about the allowance of this item. If, however, the danger of serious and prejudicial delay in the driving of the logs was apparently real and the defendant's apprehension well founded, as the referee and the court concluded, we incline to the view that reasonable payments of this nature were justifiable and properly allowed. We reach this conclusion more readily in view of the fact that Gardner testified that, before the defendant undertook the drive, he talked with *Phalen* on the subject, and that it was understood that some damages would probably have to be paid as a part of the expense of the drive.

3. The referee credited the plaintiff at the contract rate with 1,376,920 feet of logs, which he found to be the total amount of logs left in the woods by the plaintiff either skidded or not cut. The plaintiff claims that the amount of skidded logs was shown without serious dispute to be 1,500,000 feet and his claim seems to be correct. The complaint alleged that the amount was 1,500,000 feet. The first counterclaim in the answer alleged that the plaintiff cut and left in the woods 1,500,000 feet. The referee found in his sixth finding that the plaintiff left in the woods, cut and skidded but not banked, 1,500,000 feet, and a scaler testified directly that he ascertained the quantity and found it to be 1,500,000 feet. As against this there was simply an entry in an account book of the defendant, which was not verified by any one with knowledge of the facts, which recited the number of feet as 1,376,620, and the opinion of one Gray, who banked the logs in 1901, that the total amount was about 1,370,000 feet. In this state of the pleadings and proof

there can be no doubt that the plaintiff should have been credited with 1,500,000 feet, which would give him an additional credit of $660.09.

4. The last items complained of which we find it necessary to consider at any length are the credit to defendant of $2,753.24 for cutting and banking uncut and skidded logs and the credit of $3,658.71 for driving the last-named logs in the log drive of 1901. These charges were found by the referee to be just, fair, and reasonable prices for the work done, and the question is whether such findings are sustained by the evidence. Upon this question we receive no aid from the respondent's brief, although it is quite fully argued in the appellant's brief with references to the printed case. This has necessitated a wearisome examination, page by page, of the bill of exceptions, without aid from the respondent, in the effort to ascertain what testimony was given on the question, an effort which this court ought not to be compelled to make. The evidence as to the reasonable value of banking the skidded logs is very meager. No witness appears to have testified directly as to the reasonable value of such work. One Gray did the work under a written contract for $3 per thousand, and the defendant claimed credit for this amount, but there was no testimony that this was a fair or reasonable price. The work consisted simply of hauling the logs from the skids in the woods to the river. A man with a four-horse team made two or three trips a day according to the distance. A little over 100,000 feet of the amount was still standing and had to be cut, but no difference was made in the contract price on this account. There is testimony as to the amount which a team thus employed would haul and as to the expense of the team and man, and from this it appears that the total expense of banking the skidded logs could hardly exceed $1 per thousand. Making all due allowance for the cutting of the small amount of standing timber and for unexpected delays or circumstances

interfering with the work, we are unable to see how a charge in excess of $1.50 per thousand can be sustained. On this basis this item should be allowed at $2,250, a reduction of the referee's credit of $503.24.

The evidence as to the reasonable expense of the drive of 1901 is, if anything, more meager and unsatisfactory than the evidence as to the banking of the skidded logs. These logs formed a part of a large drive made by the defendant. The defendant's manager, Mr. Campbell, testified that the total cost of the drive was $10,631, and that the total amount of logs driven was 3,500,000 or 4,000,000 feet, but just what the amount was he was unable to tell. His recollection was that the expense was about $2.30 per thousand, and here his evidence practically ceases. There were no difficulties shown in driving the river in 1901 greater than those present in 1900. About two thirds of the skidded logs were landed by Gray nearly twenty miles below the landing where *Phalen* banked his logs, and consequently escaped many of the difficulties of the drive. The total cost of the drive of 1900, including damages paid and repair of dams, was but $1.45 per thousand feet, and the defendant charged Staples but fifty cents per thousand. Two experienced river drivers, Saunders and Lampman, testified on behalf of defendant as to the cost of driving logs from McDonald's bar to the St. Croix river, and fixed it at $1.60 and $1.50 respectively. In view of this testimony the allowance of the referee seems entirely too large. Adopting the highest figure placed by the defendant's witnesses, viz., $1.60 per thousand, we find that this item should be $2,400 instead of $3,658.71, a reduction of $1,258.71.

We have now stated all the changes which we find it necessary to make in the account and are ready to state the result.

Adopting the method used by the trial court and taking the referee's statement of account in the fifteenth finding as a basis, there should be added to the credit side of the plaint-

iff's account for the skidded and uncut logs $660.09, making the total of the credit side $24,095.56, and there should be deducted from the debit side the excess charged on the drive of 1900, $1,329.91; the excess charged on the banking of skidded and uncut logs in 1901, $503.24; the excess charged on the drive of 1901, $1,258.71; the damages allowed by the referee but disallowed by the court, $1,500; making a total reduction of $4,591.86, and reducing the total debits to $22,225.02. Subtracting the total debits from the total credits there remains a credit to the plaintiff of $1,870.54 for which he should have had judgment.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff for $1,870.54, as of the date of the former judgment, to wit, April 5, 1907.

STATE EX REL. FIRE & RUST PROOF CONSTRUCTION COMPANY, Appellant, vs. ICKE, Respondent.

September 30—November 10, 1908.

Mandamus: ***Duty of city engineer: Granting estimates to contractor for work done.***

1. ***Mandamus*** will not lie to compel performance of a duty unless it is a clear and absolute one imposed by law.
2. Sec. 925—94, Stats. (1898), provides, with reference to work done under contract with a city, that "the board of public works, or such officers as shall be designated to discharge its duties, may from time to time, at their discretion, grant to the contractor an estimate of the amount and proportionate value of the work done, which shall entitle him to receive the amount thereof, less twenty per cent.," etc. A contract with the city provided that in each month the city engineer should make such an estimate, and for payment to the contractor thereon. *Held*, that the statute is not a command to the city engineer, but to a board of which he is only one member, and that the duty imposed thereby is a discretionary one. If, by virtue of the contract, an

absolute duty rests upon the engineer to make such estimates, such duty is only a contractual one, and performance thereof will not be compelled by *mandamus*.

SIEBECKER and TIMLIN, JJ., are of the opinion that, to prevent failure of justice, the writ of *mandamus* should issue to enforce contract obligations when that remedy is appropriate and there is no other adequate and efficient remedy; that in this case the duty of the engineer is one imposed by law, but that it is a discretionary duty and therefore *mandamus* will not lie to compel performance.

BARNES, J., is of the opinion that if the duty of the engineer to make an estimate is clear his refusal to do so is necessarily arbitrary and the contractor has an adequate remedy at law; and for that reason *mandamus* will not lie.

APPEAL from a judgment of the municipal court of Dane county: E. RAY STEVENS, circuit judge, sitting for the municipal judge. *Affirmed.*

The petitioner, a Wisconsin corporation, contracted with the city of Madison to furnish all the labor and materials to lay gutters, to grade, macadamize, and otherwise improve Blount street of the city, and to build a concrete drain under this street from Dayton street to Lake Monona. The contract provided that during the first week of each month the defendant *John Icke,* the city engineer, should make an approximate estimate of the value of the work completed and the materials delivered; that on or before the 16th of each month the contractor should be paid the balance due as shown by such estimate, after twenty-five per cent. had been deducted (any partial payment so made not to be construed as a final or partial acceptance of the work performed); and that final payment should be made within sixty days after acceptance of the work by the city.

The petitioner alleges that on July 1, 1907, he had partly completed the cement curb and gutter and the grading, had partly excavated and put in the bottom and sides of the drain, and had delivered a large portion of the materials necessary for its construction. At or about July 8, 1907, the engineer made an estimate of the value of a portion of the work so claimed by the petitioner to have been completed, but

included nothing therein for a concrete drain between Railroad street and Washington avenue and nothing for materials delivered for such drain. Petitioner alleges that such part of the drain had been completed and the materials were delivered as called for by the contract. Demand has been made on the engineer that he make an estimate for such work and materials, but he has refused so to do. Petitioner prays that peremptory *mandamus* may issue commanding the engineer to make an estimate of the value of the part of the drain so completed and the materials so delivered.

The return asserts that, by reason of noncompliance with specifications and injury from floods, such work and material are of no value to the city. There was no traverse to the return, yet the case seems to have been tried as if at issue on the facts. The court found certain failures of relator to comply with the contract, and impossibility of estimating the value of his work to the city, which findings are assailed as not supported by the evidence. Judgment denying the peremptory writ and dismissing the action, from which relator appeals.

For the appellant there was a brief by *Sanborn & Blake,* attorneys, and *Kronshage, McGovern & Fritz,* of counsel, and oral argument by *John B. Sanborn* and *Theodore Kronshage.*

For the respondent there was a brief by *John A. Aylward,* city attorney, and *R. M. Bashford,* of counsel, and oral argument by *Mr. Bashford.*

Dodge, J. At the very threshold of this case the court is confronted with the question whether *mandamus* is either a possible or a proper remedy conceding that all the facts are as relator claims them. This question is at least akin to jurisdictional, for it must be resolved in the affirmative before the court can properly proceed to consider the controversy between the parties. Neither was this question considered by the court below apparently, nor is any aid thereon given

to this court by the briefs. *Mandamus* is an extraordinary remedy, and one of the most absolute conditions to it is that the duty sought to be compelled shall be a clear and absolute one imposed by law. *State ex rel. Pfister v. Manitowoc,* 52 Wis. 427, 9 N. W. 607; *State ex rel. O'Donnell v. Benzenberg,* 108 Wis. 435, 438, 84 N. W. 858; *State ex rel. Board of Ed. v. Hunter,* 111 Wis. 582, 588, 87 N. W. 485; *State ex rel. Wis. Met. Tel. Co. v. Milwaukee,* 132 Wis. 615, 619, 113 N. W. 40; *Fox v. Workman,* 6 Cal. App. 633, 92 Pac. 742; *Eberle v. King* (Okl.) 93 Pac. 748. A careful examination of all laws and ordinances relating to the city engineer or city surveyor of the city of Madison fails wholly to disclose any provision of law requiring him, as an absolute duty, to make certificates of partial performance of contract work. Indeed, the only provision we find with reference to estimates at all is contained in sec. 925—94, Stats. (1898)—a portion of the general charter apparently adopted by the city of Madison,—to the effect that as the work progresses "the board of public works, or such officers as shall be designated to discharge its duties, may, from time to time, at their discretion, grant to the contractor an estimate of the amount and proportionate value of the work done, which shall entitle the holder to receive the amount thereof," etc. This is not a command to the city engineer or surveyor, but to a board of which he is only one member. Besides, it does not impose an imperative duty, but a discretionary one. But, presumably, the relator would contend that a duty to issue intermediate certificates arises by virtue of the contract provision that the city engineer will make an estimate during the first week of each month as the work progresses and that payments will be made thereon. We shall not deem it necessary to decide whether a contract was competent to the city providing absolutely for such certificates and payment, thus in advance forestalling the discretion which sec. 925—94 vests in the board of public works, but shall proceed on the hypothesis of the existence of such power. Even in that case, however,

the duty resting on the engineer is only a contractual one and not one imposed by law, and as to such duties and obligations, which depend wholly upon a contract, the authorities hold with practical unanimity that courts will not exercise their power by the extraordinary writ of *mandamus* to compel performance, even by a municipal or other public corporation or its officers. *State ex rel. Burg v. Milwaukee Med. Coll.* 128 Wis. 7, 106 N. W. 116; *Chicago v. Chicago Tel. Co.* 230 Ill. 157, 161, 82 N. E. 607; *Mt. Vernon v. State ex rel. Berry,* 71 Ohio St. 428, 453, 73 N. E. 515; *Putnam F. & M. Co. v. Barrington,* 27 R. I. 422, 67 Atl. 733; *U. S. ex rel. Greenbrier C. & C. Co. v. Norfolk & W. R. Co.* 143 Fed. 266, 268. It is not an absolute duty imposed by law.

The result is that the court should have dismissed the writ and the proceedings without considering and deciding upon the facts in controversy. The present judgment correctly disposes of the action and proceeding and should not be reversed in that respect, but it should not stand as a conclusive adjudication of the facts or other controverted questions which should not have been considered. With that qualification, therefore:

By the Court.—Judgment affirmed.

SIEBECKER, J. (*concurring*). I concur in the affirmance of the judgment, but I cannot accede to the grounds upon which it is placed. I understand the grounds of decision expressed in the opinion of Mr. Justice DODGE are, in substance, that *mandamus* will not be granted in this case for the reasons (1) that the duty imposed on the engineer of the city is not a statutory one; and (2) the duty sought to be enforced, though assumed to be an absolute one, is a contractual obligation, and the courts will not exercise their power by the extraordinary writ of *mandamus* to compel performance of an obligation arising out of contract. I am of opinion that this extraordinary power of the court should be exercised to enforce contract obligations wherein this remedy

is appropriate and when there is no adequate and efficient remedy, either at law or in equity, to prevent failure of justice. As to whether or not the duty imposed and sought to be enforced is a statutory duty, it seems to me that under the portion of sec. 925—94 quoted by the court the duty is one imposed by law. The city has no power or authority to make such payments except as it is granted by this statute. The contract with plaintiff does not create such a duty, but is the medium by which the engineer is designated by the board of public works and the plaintiff to exercise the power authorized by this statute. The duty thus imposed, under which the board of public works or an officer designated by it "may, from time to time, at their discretion," grant estimates of the amount and the value of work done, is a discretionary one. Since it is a discretionary duty *mandamus* will not lie, because this remedy is never employed to enforce duties resting in discretion. The judgment should therefore be affirmed.

TIMLIN, J. I concur in the foregoing.

BARNES, J. (*concurring*). I assent to the correctness of the conclusion reached by the court, but do not concur in the reasons given for such conclusion. I see no reason why an action at law might not be maintained to recover the amount of the partial payment to which plaintiff may be entitled, upon showing an arbitrary refusal on the part of the engineer to make the estimate provided for in the contract. In the event of such refusal I think the facts which the engineer was called upon to determine could be proved by other competent testimony. In no event would *mandamus* lie unless the right sought to be enforced was clear, and, if it was clear, the action of the engineer was necessarily arbitrary. Hence the plaintiff had an adequate remedy by action at law, and *mandamus* would not lie. I base my concurrence solely on the ground above stated.

CONVERSE, Receiver, Appellant, vs. HAMILTON, Respondent.

October 2—November 10, 1908.

Interstate comity: Action by receiver of insolvent foreign corporation: Enforcement of stockholder's statutory liability.

The courts of this state will not entertain, on the ground of comity, an action by the receiver of an insolvent Minnesota corporation against a stockholder resident here to enforce collection of assessments levied by a Minnesota court (under ch. 272, Laws of Minn. 1899) on account of the double liability of stockholders under the constitution and laws of that state, contrary to the policy of this state. *Hunt v. Whewell*, 122 Wis. 33, followed. TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action is brought against a resident of the state of Wisconsin to enforce a stockholder's liability arising under the laws of Minnesota. In May, 1901, the Merchants' National Bank of St. Paul recovered a judgment against the Minnesota Thresher Manufacturing Company (hereinafter called the bankrupt), a corporation organized under the laws of the state of Minnesota, amounting to $2,936.07. Execution was issued upon said judgment and was returned unsatisfied, whereupon the plaintiff brought an action for the sequestration of the stock, property, and effects of said bankrupt, and applied for the appointment of a receiver to take charge of the same. The plaintiff receiver was appointed in said action in August, 1901. In September, 1901, an order was made in the action, requiring the creditors of the bankrupt to become parties thereto and to appear and exhibit therein their claims against said bankrupt. In pursuance of such order the claims of creditors were allowed to the amount of $443,752.12.

Sec. 3, art. X, of the constitution of Minnesota provides that "each stockholder in any corporation (excepting those

organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." The supreme court of Minnesota held in the case of *Merchants' Nat. Bank v. Minnesota T. Mfg. Co.* 90 Minn. 144, 95 N. W. 767, that the capital stock of the bankrupt was liable to assessment under this constitutional provision.

Under the law of Minnesota as it existed prior to 1899, the double liability of stockholders could only be enforced by instituting an action by or in behalf of the creditors against the corporation and its stockholders in the state of Minnesota. This law was materially modified by ch. 272, Gen. Laws of Minn. 1899, which statute was in effect at the time the receiver was appointed in this action. A statement of the substance of the Minnesota statute referred to, in so far as it is necessary to here state it, will be found in the report of *Hunt v. Whewell,* 122 Wis. 33, 34, 35, 99 N. W. 599.

At the time the receiver was appointed, the defendant, a resident of the state of Wisconsin, was the owner of twenty-one shares of the stock of the bankrupt company, of the par value of $1,050. On December 22, 1902, an order was made in the receivership proceeding levying an assessment of thirty-six per cent. upon the outstanding capital stock of said corporation and directing the receiver to institute the necessary proceedings to collect such assessment. On June 11, 1907, a second order was made levying a like assessment of sixty-four per cent. on the capital stock of the corporation for the purpose of paying its debts, and the receiver was by said order directed to enforce collection of such assessment. This action is brought upon both assessments. A demurrer to the complaint was interposed, which was sustained, and, the plaintiff declining to amend, final judgment was entered dismissing the complaint, from which judgment this appeal is taken.

For the appellant there was a brief by *Jones & Schubring,*

attorneys, and *C. A. Severance,* of counsel, and oral argument by *B. W. Jones.*

For the respondent there was a brief by *Sanborn & Blake,* and oral argument by *John B. Sanborn.*

BARNES, J. It is conceded by counsel for both parties in this case that every controverted question therein involved was also involved and decided in *Hunt v. Whewell,* 122 Wis. 33, 99 N. W. 599. It was there said in reference to the cause of action sued upon: "The liability is statutory, the remedy to enforce it is statutory, and the appellant's title is a creature of the statute." A conclusion was reached that, as to such a cause of action, the courts of this state could, if they chose, close their doors and refuse to entertain the same. The opinion in *Hunt v. Whewell* covers every phase of this case that it is considered by the court necessary or even advisable to cover here. As far as this court is concerned, the rule of *stare decisis* as to all questions involved will be applied until a higher tribunal reaches a different conclusion

In the case of *Bernheimer v. Converse,* 206 U. S. 516, 27 Sup. Ct. 755, relied upon by appellant's counsel as practically overruling *Hunt v. Whewell,* the question of comity was not involved, was not discussed, and was not passed upon in any way. The right to refuse comity was the sole question decided in *Hunt v. Whewell.* The *Bernheimer Case,* therefore, is not in conflict therewith.

For reasons given in *Hunt v. Whewell,* and upon the grounds therein stated, the judgment in this case should be affirmed.

By the Court.—Judgment affirmed.

TIMLIN, J. (*dissenting*). Upon the questions involved in this cause I think the law is in a regrettable condition of uncertainty. *Hancock Nat. Bank v. Farnum,* 176 U. S. 640, 20 Sup. Ct. 506; *Huntington v. Attrill,* 146 U. S. 657, 13

Sup. Ct. 224; *Laing v. Rigney,* 160 U. S. 531, 16 Sup. Ct. 366; *Harding v. Harding,* 198 U. S. 317, 25 Sup. Ct. 679; *Finney v. Guy,* 189 U. S. 335, 23 Sup. Ct. 558; *Bernheimer v. Converse,* 206 U. S. 516, 27 Sup. Ct. 755; *Hunt v. Whewell,* 122 Wis. 33, 99 N. W. 599; *Finney v. Guy,* 106 Wis. 256, 82 N. W. 595; *Eau Claire Nat. Bank v. Benson,* 106 Wis. 624, 82 N. W. 604.

This is not a contest relating to property in this state and between creditors resident in this state and a foreign receiver. There are many such cases, and there is some confusion on that subject. 1 Whart. Confl. of Laws (3d ed.) § 390⅔ *et seq.* But in this state the rules of law controlling that class of cases are fairly settled. There can ordinarily be in such cases no questions concerning the faith and credit to be given to judgments of a sister state, because creditors of that class are not parties to the suit in which the receiver was appointed, nor is the property in this state bound *in rem.* But where, as in the instant case, the objection is made by the debtor against whom the action is brought by the foreign receiver, and where such debtor was a party to the suit which resulted in the appointment of the foreign receiver, at least so far as that suit authorized an assessment and invested such receiver with the right to bring action or with the title in trust to the chose, different considerations arise. *Bernheimer v. Converse,* 206 U. S. 516, 27 Sup. Ct. 755; *Converse v. Ayer,* 197 Mass. 443, 84 N. E. 98. In the last-described instances, sec. 1, art. IV, Const. U. S., should control the rulings of the state court before which the foreign receiver brings his action to enforce a demand in favor of such receiver and against such defendant. In such instances we should give the order or decree of the foreign court investing the receiver with the right to bring the action the same force this decree would have in the state where made. *Hancock Nat. Bank v. Farnum,* 176 U. S. 640, 20 Sup. Ct. 506. The order is final and conclusive on these questions in

Minnesota, as we are informed. See *Griggs v. Becker,* 87 Wis. 313, 58 N. W. 396. So, also, if by the law of the foreign state the title to all personal property or choses in action having a situs in that state is vested in the receiver in trust, the foreign receiver comes into this state with the same right to sue in the courts of this state as any citizen of another state having title as trustee, and he need not invoke the law of his own state further than any other owner of a chattel or chose in action who has acquired title to the same in a sister state absolutely or in trust is required to do to manifest his ownership to the courts in this state.

The complaint here, which may, in connection with an examination of the Minnesota statutes and decisions, be taken on demurrer to be true, states the force and effect of these proceedings in Minnesota. *Hanley v. Donoghue,* 116 U. S. 1, 6 Sup. Ct. 242, and Minnesota statutes and decisions referred to in *Bernheimer v. Converse, supra,* and *Converse v. Ayer, supra.* This complaint informs us that the plaintiff by virtue of the laws of that state and his appointment as receiver became, was, and is the representative of all the stockholders and creditors of the insolvent corporation and invested with the title to all the rights of action possessed by said corporation and authorized to maintain this action. He is not then merely a juristic person possessing the latter legal quality only by force of laws which have no extraterritorial effect, as was the case in *Anglo-Am. P. Co. v. Davis P. Co.* 191 U. S. 373, 24 Sup. Ct. 92; *S. C.* 169 N. Y. 506, 62 N. E. 587, and *Hale v. Allinson,* 188 U. S. 56, 23 Sup. Ct. 244. It is here averred that the receiver is a resident and citizen of Minnesota. Sec. 2, art. IV, Const. U. S. The court of his state by order or interlocutory decree to which defendant was a party (*Converse v. Ayer* and *Bernheimer v. Converse, supra*) invested him with title, in trust for other citizens, to this right of action. A statute of Wisconsin denying this decretal order the efficacy which it possessed in

Minnesota would be, I think, invalid. *Christmas v. Russell,* 5 Wall. 290; *Keyser v. Lowell,* 117 Fed. 400. Faith and credit must be given to "judicial proceedings." Sec. 1, art. IV, Const. U. S. If so, a decision of the court to the same effect as such statutes must be erroneous. The discretion which comity permits the law forbids. The plaintiff has in such case a legal right. Whenever foreign law is necessarily invoked in any state for the purpose of establishing or maintaining juristic personality in a case where that is essential to maintain the suit, or for the purpose of maintaining a remedy, there being no right in the foreign state except that which is coupled with a particular remedy there given, which remedy on account of the absence of similar law in the state of the forum does not exist, then and in all such cases, and in many other cases not necessary to mention here, the comity of the forum may or may not recognize such juristic person or such foreign law. When, however, the right of one of its citizens to maintain the action or his title to the chose has been adjudicated in the foreign state in an action to which the defendant was a party, the right to assert such right or title in this state in a court having general common-law and equity jurisdiction is no longer a matter of comity but a matter of law. I think the judgment should be reversed.

CONVERSE, Receiver, Appellant, vs. MCCAULEY, Respondent.

October 2—November 10, 1908.

Converse v. Hamilton, ante, p. 589, followed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Jones & Schubring,* attorneys, and *C. A. Severance,* of counsel, and oral argument by *B. W. Jones.*

For the respondent there was a brief by *Buell & Lucas,* and oral argument by *C. E. Buell.*

BARNES, J. This case in all material respects is identical with *Converse v. Hamilton, ante,* p. 589, 118 N. W. 190, and is controlled thereby.

By the Court.—Judgment affirmed.

TIMLIN, J., dissents.

JONES, Appellant, vs. BROADWAY ROLLER RINK COMPANY, Respondent.

October 20—November 10, 1908.

Civil rights: Exclusion of colored person from skating rink: Pleading: Statutes: Construction: Public place of amusement: Costs: Appeal: Review of intermediate orders: Exceptions: Bill of exceptions.

1. A complaint alleging that defendant's skating rink was a place of public accommodation or amusement; that plaintiff, after paying the price of admission, was prohibited by defendant from skating for the reason that he was a colored man; and that defendant thereby denied to plaintiff the equal enjoyment of the rink by an illegal discrimination based wholly upon color,—is *held* to state a cause of action under sec. 4398c, Stats. (1898).
2. A roller skating rink to which the public are invited upon no condition but the payment of a fixed charge is a "place of public accommodation or amusement," within the meaning of sec. 4398c, Stats. (1898), relating to denial of the equal enjoyment of the accommodations of "inns, restaurants, saloons, barber shops, eating houses, public conveyances, . . . or any other place of public accommodation or amusement."
3. The provisions of sec. 4398c, Stats. (1898), relative to costs in actions brought thereunder, must prevail over the general statute (sec. 2918) enacted prior thereto.
4. Where statutes conflict in terms, ordinarily the later prevails over the earlier and the specific over the general.
5. An order determining the provisions of the judgment on the subject of costs is an intermediate order necessarily affecting the judgment, is part of the record and must be included in the judgment roll, and so far as any error thereby committed appears of record may, under sec. 3070, Stats. (1898), be reviewed on appeal from the judgment, even though the order was not excepted to and there is no bill of exceptions. *Metzger v. Fowler S. & O. Co.* 131 Wis. 633, distinguished and limited.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

Action for damages, alleging that the defendant, a corporation, was conducting a place of public accommodation and amusement, to wit, a roller skating rink, in the city of Superior; that plaintiff paid the price of admission and for skating and entered said rink, but was prohibited by the defendant from skating for the reason that the plaintiff was a colored man; that he was thus unjustly denied equal enjoyment and privilege by illegal discrimination based wholly upon color, to his damage. The answer admits the conduct of the roller skating rink and denies all other allegations.

After trial a jury brought in a verdict for the plaintiff for $25. The clerk entered judgment and taxed plaintiff's costs. Upon motion for review of the clerk's action the court entered an order that the clerk strike out and disallow all costs to the plaintiff and that he tax and allow costs to the defendant. Whereupon judgment was entered reciting such original taxation by the clerk and said order on review thereof, and the offsetting of defendant's costs against plaintiff's damages, and ordering recovery by the defendant of the balance of $5.56. From this judgment the plaintiff appeals, but settled no bill of exceptions.

For the appellant the cause was submitted on the brief of *Archibald McKay.*

W. P. Crawford, for the respondent, to the point that defendant's rink was not a "place of public accommodation or amusement," within the meaning of the statute, cited *Cecil v. Green,* 161 Ill. 265; *Kellar v. Koerber,* 61 Ohio St. 388; *Faulkner v. Solazzi,* 79 Conn. 541, 56 Atl. 947, 9 L. R. A. N. S. 601.

DODGE, J. We cannot doubt that the action attempted to be stated in the complaint and met by the answer was the action expressly authorized by sec. 4398*c,* Stats. (1898):

"Any person who shall deny to any other person, in whole or in part, the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, saloons, barber shops, eating houses, public conveyances on land or water, or any other place of public accommodation or amusement, except for reasons applicable alike to all persons of every race or color, or who shall aid or incite such denial, or require any person to pay a larger sum than the regular rate charged other persons for such accommodations, . . . shall be liable to the person aggrieved thereby in damages not less than five dollars with costs," etc.

The complaint alleges that the defendant's roller skating rink was a place of public accommodation or amusement, and that the exclusion was on the ground of plaintiff's color, neither of which allegations is of any materiality or significance to an action either of tort or contract independent of such statute. We think, also, that nothing in the record shows that the roller skating rink maintained by the defendant was not a place of accommodation or amusement within the terms of the statute. It is alleged to have been such place, and presumably the evidence went as far as possible in support of such allegation. A public roller skating rink is undoubtedly a public place of amusement. This, however, probably would not suffice to bring it within the statute if it were entirely different in character from the places of accommodation or amusement specifically named therein, for by reason of the context the rule *noscitur a sociis* applies, and the other places of accommodation and amusement intended by the statute are only such as bear some resemblance to those specifically named. Our statute is quite exhaustive in its specifications, much more so than the statutes of some of the other states. Thus it includes in the specifications both saloons and barber shops, which have been held in other states not to be included in a statute omitting to specifically name them, but containing the words "other places of accommodation and amusement." *Faulkner v. Solazzi,* 79 Conn. 541,

65 Atl. 947; *Kellar v. Koerber,* 61 Ohio St. 388, 55 N. E. 1002. By their specification in the Wisconsin statute the genus or class to which resemblance must be found is of course enlarged. Appellant's counsel has given us no aid whatever by citation of authorities or reference to the construction of similar statutes in other states. We find ourselves unable, however, to conceive any class of places of public accommodation or amusement which would not include a roller skating rink to which the public were generally invited upon no condition but the payment of a fixed charge; public in as broad a sense as is the common carrier or the innkeeper, the exclusion from which of an individual or a class must infer discrimination and denial of privileges which all other persons enjoy by virtue merely of their membership in the public or general community. Public accommodation or amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender of accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites every one to enter, does so only for the purpose of selling to each individually either service or merchandise. This distinction has been often noted. We append a few illustrative cases: Public eating house, *Humburd v. Crawford,* 128 Iowa, 743, 105 N. W. 330; bootblacking stand, *Burks v. Bosso,* 81 App. Div. 530, 81 N. Y. Supp. 384; *S. C.* 180 N. Y. 341, 73 N. E. 58; theater, *Joseph v. Bidwell,* 28 La. Ann. 382; bowling alley, *Johnson v. Humphrey P. C.* 24 Ohio Cir. Ct. 135; billiard room, *Comm. v. Sylvester,* 13 Allen, 247; skating rink, *People v. King,* 110 N. Y. 418, 18 N. E. 245. From reason and authority, we are convinced that a roller rink may fall within sec. 4398*c,* Stats. (1898), and therefore that the complaint attempts to state a cause of action based upon that statute.

This being, then, an action specially authorized by sec. 4398c, enacted in 1895, and the minimum amount of the recovery being therein prescribed, we can see no escape from the conclusion that that section must control upon the subject of costs specifically treated therein, over the general statute (sec. 2918, Stats. 1898), enacted long previous, wherever the two conflict. There is nothing to obstruct the presumption of an intention to legislate according to the words used in 1895 when the legislature provided that plaintiff's recovery, though as low as $5, should entitle him to costs. Where statutes conflict in terms, ordinarily the later prevails over the earlier and the specific over the general. *Blabon v. Gilchrist,* 67 Wis. 38, 45, 29 N. W. 220; *State ex rel. Donnelly v. Hobe,* 106 Wis. 411, 423, 82 N. W. 336; *Cotzhausen v. H. W. Johns Mfg. Co.* 107 Wis. 59, 82 N. W. 716; *Gymnastic Asso. v. Milwaukee,* 129 Wis. 429, 109 N. W. 109.

But respondent urges that we cannot review the order awarding costs for the reason that no exception thereto appears upon the record, and the judgment roll or record is not enlarged by bill of exceptions. An order determining the provisions of the judgment on the subject of costs is an order prior to judgment, and it is within the terms of sec. 3070, Stats. (1898)—an order "which involves the merits and necessarily affects the judgment," and which therefore is a part of the record and must be included in the judgment roll by virtue of sec. 2898, Stats. (1898). *Hoey v. Pierron,* 67 Wis. 262, 267, 30 N. W. 692; *Morris v. Nat. P. Soc.* 106 Wis. 92, 81 N. W. 1036; *Hildebrand v. Am. F. A. Co.* 109 Wis. 171, 85 N. W. 268. It therefore is an intermediate order which may be reviewed on appeal "whether the same were excepted to or not" by virtue of sec. 3070. It is true that general language was used indicating the necessity of exception, and perhaps of bill of exceptions, in *Cord v. Southwell,* 15 Wis. 211, and *Perkins v. Davis,* 16 Wis. 470. But it was after the decision in those cases that sec. 3070 in its

present form was enacted, containing as new matter, with reference to the review on appeal of such orders, the words: "whether the same were excepted to or not; nor shall it be necessary in any case to take any exception or settle any bill of exceptions to enable the supreme court to review any alleged error which would, without a bill of exceptions, appear upon the face of the record."

It was a mistake, therefore, to assume that the rule of those early cases still persists, as this court apparently did in *Fowler v. Metzger S. & O. Co.* 131 Wis. 633, 111 N. W. 677. The broad language in the last case: "But an order allowing or disallowing costs is not reviewable by this court, unless the evidence upon which it is based and the exceptions thereto are preserved in a bill of exceptions (*Cord v. Southwell,* 15 Wis. 211; *Perkins v. Davis,* 16 Wis. 470)," according to its words is incorrect. Such an order is part of the record, and may be reviewed to the extent that any error thereby committed appears of record. That language, however, read in its application to the situation then before the court, was entirely correct. That situation was a review of the taxation of certain items by the clerk, depending for its correctness upon proceedings and evidence had before the clerk and before the court, which could have no place in the record except by means of a bill of exceptions. As to such action it has uniformly been held that the errors do not appear upon the record without a bill of exceptions and therefore cannot be reviewed. *State v. Wertzel,* 84 Wis. 344, 347, 54 N. W. 579; *Lauterbach v. Netzo,* 111 Wis. 322, 87 N. W. 230; *Dunbar v. Montreal River L. Co.* 127 Wis. 130, 106 N. W. 389.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of plaintiff for $25 damages and $27.27 costs as of August 22, 1907.

PAULUS, Appellant, vs. HART-PARR COMPANY, Respondent.

October 20—November 10, 1908

Foreign corporations: Service of summons: Actions arising out of business transacted in this state: Interstate commerce: Service after forfeiture of license.

1. An order for machinery from the defendant, an Iowa corporation, was made and accepted in Iowa, but the machinery was delivered to plaintiff, payment therefor made, the machinery tested, the contract rescinded on account of failure to comply with warranty, and the property returned to defendant's agents, all in Wisconsin. In an action to recover the price paid, *held* that, even if the contract was an Iowa contract, the cause of action arose out of business transacted in this state, within the meaning of subd. 13, sec. 2637, Stats. (1898), and hence that the summons was properly served upon the assistant secretary of state of Wisconsin, who, after the contract was made but before delivery of the machinery, had been duly appointed by defendant, pursuant to sec. 1770*b*, Stats. (1898), as its attorney for service of summons, etc., in such actions.
2. The statutes above mentioned do not relate merely to state business, but include and apply to business transactions within this state even when they grow out of contracts made in other states for shipment of property into this state, thus involving interstate commerce.
3. The fact that defendant's license to do business in Wisconsin was revoked after the cause of action arose but prior to the service of the summons was immaterial, since under the statutes mentioned the right to serve upon the assistant secretary of state continued as long as any liability of the defendant remained outstanding in this state.

APPEAL from an order of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

The defendant is a foreign corporation. On January 1, 1906, plaintiff at Charles City, Iowa, signed an order for a gasoline engine, subject to approval by the defendant. By the terms of the order it was provided that plaintiff should pay $1,480 and freight and charges from Charles City, Iowa, to Bloomer, Wisconsin, for said engine, and also deliver a

certain twelve horse power steam engine and tank to the defendant, the $1,480 to be evidenced by three notes, one for $494 due December 1, 1906, one for $493 due December 1, 1907, and one for $493 due December 1, 1908, each drawing six per cent. interest and secured by first mortgage on the engine, and drawing eight per cent. after maturity. It also appears that these notes were executed and delivered at Bloomer, Wisconsin, payable in Charles City, Iowa, and bore date April 14, 1906. The order contained a warranty on the engine sold that "should any part (except batteries and belting, which are not warranted) prove defective within one year from date of sale, through inferior material or workmanship, the same shall be furnished by the *Hart-Parr Company,* on board cars at Charles City, Iowa, the defective parts to be returned prepaid to the *Hart-Parr Company* at its factory for inspection, and if found defective the charge made for the new parts furnished will be remitted." Further provision is made in the order for notice to the defendant in case of failure to fill warranty, and if the engine cannot be made to fill the warranty it shall be returned by the purchaser, free of charge, to the place where received, and the payments made refunded. It further provides that the title to said engine shall not pass from defendant until settlement is concluded and accepted by the defendant; that the engine should be shipped on or before the 15th day of April, 1906, or as soon thereafter as possible, to Bloomer, Wisconsin, in care of P. S. Peterson & Son, for the plaintiff.

The engine was delivered at Bloomer, Wisconsin, on or before June 7, 1906, and there paid for by delivery of the notes and steam engine. Afterwards and in due time the machine was tested and found not in compliance with the warranty, the sale rescinded, and the property delivered to Peterson & Son, defendant's agents at Bloomer, on or before September 16, 1906, and return of the notes and property delivered to defendant in payment thereof demanded, which

demand was refused. The engine was at Bloomer, Wisconsin, when this action was commenced, and alleged by plaintiff to be the property of the defendant.

This action was commenced by service of the summons on the assistant secretary of state January 27, 1908. The complaint, among other things, alleged that defendant was a foreign corporation authorized to do business in the state of Wisconsin; that the plaintiff promised to pay $1,892 for the engine, $62 being freight and charges, $350 allowed for the steam engine delivered to defendant, and the balance in notes as heretofore specified; that the engine purchased by plaintiff was not in accordance with the warranty and was of no value; that the defendant sold and transferred the promissory notes given in part payment for the engine to parties claiming to be innocent purchasers; that there was a total failure of consideration for the notes, property, and money given by plaintiff to the defendant in payment of the gasoline engine purchased, and that the defendant became indebted to the plaintiff in the sum of $1,892, for which sum, together with costs, plaintiff demanded judgment.

On the 25th day of January, 1906, the defendant qualified to do business in Wisconsin, certifying, among other things, (1) that its principal office within the state of Wisconsin was at Madison; (2) that the name and address of the agent or manager representing it in Wisconsin was R. P. Howard, Madison, Wisconsin; (3) that the nature of the business to be transacted in Wisconsin was to be the sale of gasoline engines and machinery; (4) that $25,000 of its capital stock was represented in Wisconsin by property or business there; (5) that it would comply with all the laws of the state of Wisconsin relating to foreign corporations. The defendant appointed the secretary of state and his assistant and their successors its attorneys to receive service of process in any action or proceeding against it, which service should have the same legal force, effect, and validity as if served on the cor-

poration, as long as any liability remained outstanding in the state of Wisconsin.

The plaintiff obtained judgment by default, and the defendant thereafter obtained an order setting aside the service and judgment with $10 costs of motion, on the ground that the defendant was a foreign corporation and not authorized to do business in the state of Wisconsin until the 25th day of January, 1906, and that the license to do business within this state was revoked April 1, 1907, from which order plaintiff appealed.

For the appellant there was a brief by *W. M. Bowe* and *Henry Lebeis, Jr.*, and oral argument by *Mr. Bowe*. They cited, among other cases, *Colorado I. Works v. Sierra Grande M. Co.* 15 Colo. 499; *Brown v. Gates,* 120 Wis. 349; *Hiller v. B. & M. R. R. Co.* 70 N. Y. 223; *Bruil v. N. W. Mut. R. Asso.* 72 Wis. 430; *Rosenblatt v. Jersey N. Co.* 90 N. Y. Supp. 816; *Boggs v. Inter-Am. M. & S. Co.* 105 Md. 371, 66 Atl. 259; *Youmans v. Minn. T. I. & T. Co.* 67 Fed. 282; *Johnston v. Trade Ins. Co.* 132 Mass. 432; *Groel v. United E. Co.* 69 N. J. Eq. 397, 60 Atl. 822; *Johnston v. Mut. R. L. Ins. Co.* 93 N. Y. Supp. 1048; *Fisher v. Traders' Mut. L. Ins. Co.* 136 N. C. 217, 48 S. E. 667; *Phelps v. Mut. R. F. L. Asso.* 112 Fed. 453; *Mut. R. F. L. Asso. v. Phelps,* 190 U. S. 147; *McCord L. Co. v. Doyle,* 97 Fed. 22.

L. J. Rusk, for the respondent, cited *Andrews v. Mich. Cent. R. Co.* 99 Mass. 534; *Desper v. Continental W. M. Co.* 137 Mass. 252; 2 Morawetz, Priv. Corp. (2d ed.) § 980; *Camden R. M. Co. v. Swede I. Co.* 32 N. J. Law, 15; *Peters v. Neely,* 16 Lea, 275; *Barrow S. Co. v. Kane,* 170 U. S. 100; *Council Bluffs C. Co. v. Omaha T. Mfg. Co.* 49 Neb. 537, 68 N. W. 929; *Hayden v. Androscoggin Mills,* 1 Fed. 93; *Pinney v. Providence L. & I. Co.* 106 Wis. 396, 50 L. R. A. 577, note on pp. 591, 597; *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829; *Catlin & P. Co. v. Schuppert,* 130 Wis. 642; *U. S. G. Co. v. Gleason,* 135 Wis. 539, 116

N. W. 238; *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469; 2 Parsons, Cont. *582; *Brown v. Gates,* 120 Wis. 349; *Mut. R. F. L. Asso. v. Boyer,* 62 Kan. 31, 50 L. R. A. 538; *Swann v. Mut. R. F. L. Asso.* 100 Fed. 922; *Greaves v. Posner,* 111 Iowa, 651, 82 N. W. 1022.

KERWIN, J. Passing the question as to whether defendant had property in the state of Wisconsin at the time of service upon the assistant secretary of state, we proceed to examine the other ground urged by appellant to sustain the service, namely, that the cause of action arose out of business transacted in this state. Subd. 13, sec. 2637, Stats. (1898), provides, in effect, that in an action against a foreign corporation service may be made upon the secretary of state, "as provided in sec. 1770*b*," but that such service can be had upon the secretary of state only when the cause of action arises out of business transacted in this state, or when the defendant has property therein. Clause "f" of subd. 3, sec. 1770*b*, Stats. (Supp. 1906), provides that a foreign corporation, in qualifying to do business in this state, "shall constitute and appoint the secretary of state its true and lawful attorney upon whom the summons, notices, pleadings or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract or transaction in this state, and stipulate that service thereof upon the secretary of state, or his assistant, shall be accepted irrevocably as a valid service upon it, and that such appointment and stipulation shall continue in force irrevocably so long as any liability of such corporation remains outstanding in this state." The defendant fully complied with the provisions of sec. 1770*b* on the 25th day of January, 1906, and before the engine was delivered at Bloomer, Wisconsin. Afterwards and on April 1, 1907, the license of defendant was forfeited because of failure to file an annual report as required by the statute. In complying with sec. 1770*b* the

defendant certified that the nature of the business to be transacted in Wisconsin was the sale of gasoline engines and machinery, and filed with the secretary of state, in compliance with sec. 1770*b*, the appointment of the secretary of state and his assistant and their successors in office as its attorneys, upon whom all summons, notices, pleadings, and processes, in any action or proceeding against such corporation, should be served; and by said appointment it agreed that such service should be of the same legal force and effect and validity as if served upon the defendant, and that such appointment should continue in force and effect as long as any liability remained outstanding against it in the state of Wisconsin.

This appointment was strictly in compliance with the statute and authorized the service of the summons upon the assistant secretary of state, provided the cause of action upon which suit was brought arose out of a business transaction in Wisconsin. True, the order for the machinery was made and accepted in the state of Iowa, but the machinery was delivered and received by plaintiff in Wisconsin, payment made there, test of machinery made there, contract rescinded on account of failure to comply with warranty, and property returned to the agents of defendant at Bloomer, Wisconsin, because not in compliance with warranty. Even if the contract for the purchase of the machinery was an Iowa contract, which we do not decide, still the whole transaction resulting in the cause of action clearly shows that at least a considerable part of the business out of which the cause of action arose was transacted in Wisconsin.

Counsel for respondent insists that the statutes referred to respecting service upon the secretary of state or his assistant relate to "state business" and not to interstate business. But we cannot think the legislature intended to exclude a business transaction within the state because it grew out of a contract made beyond the state for the shipment of property

into the state, even though such contract involved interstate business. It being established that part of the business out of which the cause of action arose was transacted within this state and before defendant's license was revoked, it necessarily follows, upon well-settled principles, that the service upon the assistant secretary of state was sufficient. *Hiller v. B. & M. R. R. Co.* 70 N. Y. 223; *Farrior v. New Eng. M. S. Co.* 88 Ala. 275, 7 South. 200; *State v. Bristol Sav. Bank,* 108 Ala. 3, 18 South. 533.

It is also insisted that, after defendant's license to do business in Wisconsin had been revoked, service could not be made upon the assistant secretary of state under the appointment. This position we think untenable, under the statutes heretofore referred to, as well as the power which continued in force irrevocably the appointment of the secretary of state and his assistant to receive service of process as long as any liability of the defendant remained outstanding in the state of Wisconsin. The cause of action arose before the defendant's license was forfeited and remained an outstanding liability against the defendant when this action was commenced. Hence the fact that at the time the action was commenced the defendant had removed from the state does not affect the service. The right to serve upon the assistant secretary of state continued so long as any liability remained outstanding in the state. *Hardy v. Ketchum,* 67 Fed. 282; *McCord L. Co. v. Doyle,* 97 Fed. 22; *Boggs v. Inter-Am. M. & S. Co.* 105 Md. 371, 66 Atl. 259; *Groel v. United E. Co.* 69 N. J. Eq. 397, 60 Atl. 822.

By the Court.—The order appealed from is reversed, and the action remanded for further proceedings according to law and this opinion.

GIVANS, Respondent, vs. SEARLE, Appellant.

October 20—November 10, 1908.

Justices' courts: Jurisdiction: Attachment: Insufficiency of affidavit: Waiver: Admission of requisite facts: General appearance.

1. Under secs. 3701, 3702, Stats. (1898), relating to affidavits for attachment and amendment thereof, the jurisdiction of a justice of the peace to issue a warrant of attachment depends not upon the sufficiency of the preliminary affidavit, but upon the actual existence of the requisite facts, and these may be shown at any time before the trial, provided they existed at the time the original affidavit was first presented to the justice.
2. Although the original affidavit for an attachment was insufficient, yet if, before the trial and while the justice had jurisdiction to entertain the cause and allow an amendment, the defendant appeared generally and went to trial without objecting to the attachment on the ground of insufficiency of the affidavit, this was a waiver of that objection and an admission of the existence of the facts upon which jurisdiction to issue the warrant rested, so that, without amendment of the original affidavit, the justice continued to have jurisdiction not only to render a personal judgment against defendant but to entertain and determine the attachment proceedings.

APPEAL from a judgment of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Affirmed.*

Morris E. Yager, for the appellant, cited, besides other cases, *Damp v. Dane,* 29 Wis. 419; *Martin v. Eastman,* 109 Wis. 286, 85 N. W. 359; *Streissguth v. Reigelman,* 75 Wis. 212, 43 N. W. 1116; *Trautmann v. Schwalm,* 80 Wis. 275, 50 N. W. 99; *Griswold v. Nichols,* 111 Wis. 344, 87 N. W. 300; *Conley v. Conley,* 78 Wis. 665, 47 N. W. 950; *Hager v. Falk,* 82 Wis. 644, 52 N. W. 432; *Detroit S. Co. v. Kelly,* 78 Wis. 134, 47 N. W. 187; *Steen v. Norton,* 45 Wis. 412; secs. 3702, 3704, Stats. (1898); *Goodyear R. Co. v. Knapp,* 61 Wis. 103, 20 N. W. 651.

For the respondent there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy.*

Among other references upon the part of the respondent were the following: Secs. 2731*a*, 3768, Stats. (1898); *Heath v. Heath,* 31 Wis. 223; *Rosenthal v. Wehe,* 58 Wis. 621, 17 N. W. 318; secs. 3706, 3715*b*, 3715*c*, Stats. (1898); *Bull v. Christenson,* 61 Wis. 576, 21 N. W. 521; sec. 2925, Stats. (1898); *Leary v. Leary,* 68 Wis. 662, 32 N. W. 623; *Edwards v. Smith,* 48 Wis. 254, 3 N. W. 758.

TIMLIN, J. This action was commenced by writ of attachment in justice's court based upon the nonresidence of defendant. Certain property was seized. The defendant appeared and answered in justice's court, and after a trial that court gave judgment against him, from which he appealed to the circuit court, where he moved that the action be dismissed because the justice did not have jurisdiction of the subject matter of the action on account of a defect in the affidavit for attachment. This affidavit is conceded to be defective, because the requisite facts were stated only upon hearsay evidence, within the rule of *Streissguth v. Reigelman,* 75 Wis. 212, 43 N. W. 1116. Plaintiff moved for leave to amend this affidavit, and the circuit court denied the motion of the defendant and granted this motion of the plaintiff. Exception was taken to this ruling, and the parties went to trial upon the merits before the circuit court, where the plaintiff had judgment for $102.67 damages and $59.18 costs, $30.55 of which were costs for taking and keeping the attached property in justice's court, and $12.03 of which were the other costs taxed in justice's court. Upon taxation of costs before the clerk of the circuit court he allowed this item of $30.55 above mentioned and disallowed the $12.03. Each party moved the court to review the taxation of the clerk and that court allowed both items, or $42.58 for costs in justice's court.

The form for warrant of attachment in justice's court is prescribed by sec. 3704, Stats. (1898), and consists of a com-

mand to the sheriff or any constable of the county to attach the goods and chattels, etc., of the defendant, and also to summon the defendant, if to be found, to be and appear before the justice, at the time and place designated, to answer to the plaintiff; and it may be executed by seizure of property without summoning the defendant in case he cannot be found, or by a seizure of property, also summoning the defendant if he can be found, or by summoning the defendant. Appellant contends that the justice had no jurisdiction of the subject matter of the attachment action on the showing made, that consequently the circuit court acquired no jurisdiction by the appeal, and that his appearance in both courts was no waiver, and he cites *Steen v. Norton,* 45 Wis. 412, and other cases in this court construing different statutes, which cases he considers decisive. We do not so understand the decisions of this court. It is true in *Steen v. Norton, supra,* some general language is used condemnatory of *Blackwood v. Jones,* 27 Wis. 498, and *Fairfield v. Madison Mfg. Co.* 38 Wis. 346, but it is also announced in *Steen v. Norton, supra,* that in an attachment in justice's court, "if the defendant appear and submit without objection, he cures the defect of the process as a personal summons, but not as an attachment of property. The justice takes jurisdiction to render personal judgment against him, but not against the property attached." Looking back now to the two condemned cases, it would seem that this was all that was decided in either. But the writer of the opinion in *Steen v. Norton* evidently understood these two cases to go further and to decide that the appearance of the defendant waived all objection to the jurisdiction of the justice over the subject matter of the attachment. Hence the cases were criticised, and declared to be overruled so far as they conflicted with *Steen v. Norton.* The latter case was one in which the contest was between the plaintiff and the garnishee defendant, and in no sense in-

cluded the legal effect of the appearance of the defendant in the principal action to which the garnishment was ancillary; and, so far as the two condemned cases decided that the defendant in the attachment case might waive objection to a personal judgment against him by appearance and answer to the merits, without, however, by such appearance waiving objection to the lack of jurisdiction to attach property, they were in no wise in conflict with *Steen v. Norton,* and to this extent were not overruled by that case. Six years later, when the case of *Bull v. Christenson,* 61 Wis. 576, 21 N. W. 521, came before this court, the real points decided in *Blackwood v. Jones, supra,* and *Fairfield v. Madison Mfg. Co., supra,* were again conclusively decided. So that prior to the enactment of ch. 134, Laws of 1893 (last part of sec. 3702, Stats. 1898), the law of this state upon this subject stood as follows: The filing of a proper affidavit with the justice of the peace was a condition precedent to the exercise of his jurisdiction to issue a writ of attachment, but having by statute jurisdiction of actions at law upon contract within the specified limit (sec. 3572), and upon voluntary appearance of the parties (sec. 3593), if the defendant in the attachment appeared generally before the justice, and especially if he went to trial on the merits, the justice had jurisdiction to render a personal judgment against him, thus leaving the attachment invalid for want of jurisdiction of the subject matter of issuing the writ, but the personal judgment based upon his voluntary submission to the court valid.

The respondent points out that now, by the last subdivision of sec. 3702, Stats. (1898), the affidavit for attachment is amendable, "and the new affidavit shall stand in lieu of the original one for all purposes;" that upon attachment in circuit court the affidavit is amendable, and "the new affidavit shall stand in lieu of the old one for all purposes" (sec. 2731*a*); that by sec. 3768, Stats. (1898), this action was to

be tried in the circuit court as actions originally brought there.

"Any person may commence an action by warrant of attachment . . . in the cases, upon the condition and in the manner provided by this chapter." Sec. 3701, Stats. (1898).

"Before a warrant of attachment shall be issued the plaintiff or some person in his behalf shall make and file with the justice an affidavit stating," etc. Sec. 3702, Stats. (1898).

Leaving these provisions intact, the legislature declared by ch. 134, Laws of 1893 (last part of sec. 3702, Stats. 1898), first, that this affidavit might be amended at any time before trial by the substitution of a new affidavit; second, this new affidavit should contain allegations of facts existing at the time of making the former affidavit; third, that the new affidavit should stand in lieu of the original affidavit for all purposes. The necessary effect of this amendment was to make the jurisdiction of the justice depend, not upon a preliminary showing of fact, but upon the actual existence of the facts upon which jurisdiction was made to rest, and these facts might be shown at any time before trial, provided they existed at the time the original and insufficient affidavit was first presented to the justice.

In the case at bar there was no sufficient affidavit originally presented to the justice, nor was there any amended affidavit filed in justice's court before trial. But within the time allowed for filing the amended affidavit—that is to say, before trial, and while the justice had jurisdiction to entertain the cause and allow the amendment—the defendant appeared generally in the case and went to trial without objecting to the attachment on this ground. This may be considered an admission of the existence of the facts upon which jurisdiction to issue the writ rested.

Construing all the provisions of this statute together, namely, those making the presentation of the affidavit in the first instance a condition precedent to the exercise of the ju-

risdiction of the justice to issue a warrant of attachment, and the later amendment providing a way in which the failure to do this might be rectified if its sufficiency had been challenged, we must hold that the objection to the attachment was also waived by the general appearance of the defendant and his failure to object to the sufficiency of the affidavit, and that the justice had, at the time of the general appearance of the defendant, and by virtue of such general appearance and failure to object continued to have, jurisdiction not only to render the judgment appealed from, but to entertain and determine the attachment proceedings. This makes the decision of other questions unnecessary, and it follows that the judgment must be affirmed.

By the Court.—Judgment affirmed.

KAWIECKA, Appellant, vs. CITY OF SUPERIOR, Respondent.

October 20—November 10, 1908.

Municipal corporations: Injury from defective sidewalk: Court and jury: Slight difference in level.

1. Whether alleged defects constituted an insufficiency or want of repair in a highway within the meaning of sec. 1339, Stats. (1898), is generally a question for the jury under proper restrictions, but may be one for the court if the conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy.
2. A city is not bound to keep its streets or sidewalks at all times in a condition of absolute safety, but only reasonably safe for travel.
3. The rebuilding of a portion of a sidewalk on a bridge by nailing planks to the upper side thereof, leaving the other portion unaltered, so that there was an abrupt change in level of two inches, is *held*, as matter of law, not to have created an insufficiency or want of repair in the walk such as would render the city liable to a person injured by tripping on the edge of the planking.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an appeal from a judgment entered in pursuance of an order sustaining a demurrer *ore tenus* to the complaint in an action brought against the city of *Superior* for damages for personal injury alleged to have been caused by a defective sidewalk on a bridge in that city. The complaint alleged, among other things, that during the month of July, 1905, the city rebuilt a portion of the sidewalk on said bridge by nailing planks two inches in thickness to the upper side of the walk as theretofore constructed, and permitting the other portion of the walk to remain unchanged until September 4, 1905, when the accident happened upon which suit was predicated. In consequence of such inaction on the part of the city there was an abrupt drop of two inches going in one direction, and an abrupt ascent of two inches going in the opposite direction. The accident occurred about 9 o'clock in the evening, and the plaintiff alleged that, in passing over the portion of the walk which was not rebuilt to that which had been, her foot came in contact with the edge of the two-inch plank nearest to the portion of the walk not rebuilt, and that in consequence she tripped and fell, sustaining injuries thereby. The complaint further alleges that the bridge in question was one-half mile in length, and that the sidewalk thereon was level from one end to the other as it existed before the partial repairs were made, and that it was one of the principal public highways in the city of *Superior.*

For the appellant there was a brief by *Grace & Hudnall,* and oral argument by *G. B. Hudnall.* They cited, among other cases, *Moriarty v. Lewiston,* 98 Me. 482, 16 Am. Neg. Rep. 73; *George v. Haverhill,* 110 Mass. 506; *Holmes v. Drew,* 151 Mass. 578, 25 N. E. 22; *Dowd v. Chicopee,* 116 Mass. 93; *Redford v. Woburn,* 176 Mass. 520, 57 N. E. 1008; *Lamb v. Worcester,* 177 Mass. 82, 9 Am. Neg. Rep. 53; *Wile v. Los Angeles I. & C. S. Co.* 2 Cal. App. 190, 19

Am. Neg. Rep. 85; *Baxter v. Cedar Rapids,* 103 Iowa, 599, 72 N. W. 790; *Marvin v. New Bedford,* 158 Mass. 464, 33 N. E. 605; *Bieber v. St. Paul,* 87 Minn. 35, 91 N. W. 20; *Schroth v. Prescott,* 63 Wis. 652; *S. C.* 68 Wis. 678; *Lyon v. Grand Rapids,* 121 Wis. 609; 15 Am. & Eng. Ency. of Law (2d ed.) 440; *Cook v. Milwaukee,* 27 Wis. 191; *Hill v. Fond du Lac,* 56 Wis. 242; *Whitney v. Milwaukee,* 57 Wis. 639; *McMaugh v. Milwaukee,* 32 Wis. 200; *Perkins v. Fond du Lac,* 34 Wis. 435; *Grossenbach v. Milwaukee,* 65 Wis. 31; *Morrison v. Madison,* 96 Wis. 452.

For the respondent there was a brief by *Thos. E. Lyons* and *T. L. McIntosh,* and oral argument by *Mr. McIntosh.*

BARNES, J. Generally speaking, insufficiency or want of repair in a highway is a question of fact for the jury, under instruction from the court as to what is meant by these terms in the statute. *Wheeler v. Westport,* 30 Wis. 392. And the question is always one for a jury, unless conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy. When the conditions shown are such that different minds may draw different inferences and arrive at different conclusions, the jury, and not the court, must make the ultimate determination. *Prahl v. Waupaca,* 109 Wis. 299, 85 N. W. 350. Undoubtedly defects in a highway may be relied upon as a basis for recovery for injuries sustained, in reference to which it is the duty of the court to hold as a matter of law that such alleged defects do not constitute an insufficiency or want of repair within the meaning of the statute. *Cook v. Milwaukee,* 24 Wis. 270; *S. C.* 27 Wis. 191; *Kleiner v. Madison,* 104 Wis. 339, 80 N. W. 453; *Burroughs v. Milwaukee,* 110 Wis. 478, 86 N. W. 159; *Dapper v. Milwaukee,* 107 Wis. 88, 82 N. W. 725; *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Koepke v. Milwaukee,* 112 Wis. 475, 88 N. W. 238; *De Pere v. Hibbard,* 104 Wis. 666, 80 N. W. 933; *Cooper v. Waterloo,* 98

Wis. 424, 74 N. W. 115. A city is not bound to keep its streets or sidewalks at all times in a condition of absolute safety, but only reasonably safe. *Kleiner v. Madison, supra; Wheeler v. Westport, supra; Morrison v. Eau Claire,* 115 Wis. 538, 92 N. W. 280; *Vass v. Waukesha,* 90 Wis. 337, 63 N. W. 280.

In view of the foregoing principles, which appear to be well established, it remains to be considered whether the case before us is one wherein the conclusion reached by a jury should determine the sufficiency or insufficiency of the sidewalk in question, or one wherein the court should hold as a matter of law that there is no room for controversy upon the subject. It is not always easy to determine just where the province of the court in passing upon such a question ends and that of the jury begins. For many reasons that might be enumerated, it is well nigh impossible for municipalities to keep streets and sidewalks in perfect condition at all times. Slight inequalities will almost unavoidably be found in sidewalks in our cities over which there is a large volume of travel. Because of the serious problem that confronts municipalities in reference to keeping their highways in an efficient state of repair, the court in construing sec. 1339, Stats. (1898), has not required them to keep such highways in perfect condition, but only reasonably safe for travel. Under the decisions cited the trial court was right in holding that the sidewalk in question was reasonably safe for travel, and that the defect complained of was too trifling and inconsequential to create a basis for a right of action under said sec. 1339.

By the Court.—Judgment affirmed.

HANSON, Appellant, vs. SUPERIOR MANUFACTURING COMPANY, Respondent.

October 21—November 10, 1908.

Master and servant: Negligence: Injury to servant: Defective machinery: Duty to warn servant of danger.

1. The dumping apparatus in plain sight on the outside of a small car in which stone was pushed and pulled by workmen on a tramway in defendant's factory yard was not defective, so as to render defendant liable for an injury to one of the workmen, merely because it was so constructed that when the car was dumped a cross-arm at the end thereof descended so near to the planking of the tramway that a person's foot, if under it, would be injured, where in the ordinary and usual operation of the car the feet of the workmen would not be anywhere near the cross-arm.
2. A workman whose foot was crushed between the cross-arm and the planking had worked twenty-three hours on the tramway with similar cars about a year before the injury and had then observed that the cross-arm descended so near the planking that if one's foot were caught between them there would be danger of serious injury. *Held*, that defendant was not negligent in failing to warn him of the danger when he again went to work on the tramway about three hours before the accident.
3. The facts that the car causing the injury was a new one, the cross-arm of which descended somewhat lower than did those on the cars with which plaintiff had previously worked, and that he supposed that he was working with a car of the same pattern, were immaterial, since he was bound to anticipate the possibility of injury while working with the old cars.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action to recover for personal injuries received by the plaintiff while in defendant's employ as a common laborer June 5, 1907. On and prior to said date the defendant owned and operated a factory and yard for the manufacture of cement and lime at Superior, which was located on the bay, so that vessels could and did discharge cargoes of stone into the yard. A frame tramway about twenty feet in

height and four feet in width extended from the dock back into the yard, with a plank surface upon which was a narrow-gauge railway track three feet in width. Upon this track several small dump cars were operated. These cars were filled with stone by machinery from vessels at the dock, and were then pushed and pulled by the employees out into the yard and dumped into the yard beneath. The cars are about three and one-half feet in height from the top of the rail, and wide enough so that the sides project over the sides of the tramway structure. They have a floor in the shape of an inverted V, and have doors opening horizontally on each side and which swing on hinges at the top. These doors are opened by means of a lever and a dumping apparatus which is operated by the workman at the rear when the car reaches the proper place. This apparatus consists of a shaft running straight through the car lengthwise under the floor, which shaft is connected by rods at each end of and on the outside of the car with the lower parts of the swinging doors. As the workman at the rear of the car lifts the lever, an iron cross-arm turns from a horizontal to a vertical position at each end, and the rods attached to the doors push the doors outward, thus opening them and allowing the contents of the car to run out on each side. When the load is dumped the operation is reversed, and the cross-arm again assumes a horizontal position and automatically locks the doors shut. The cars are usually dumped while moving. One man pulls the car in front by means of a rope, and another man pushes behind and operates the dumping apparatus at the proper place.

The plaintiff had been employed by the defendant as a common laborer about the yard and in the boats for more than a year, and had worked twenty-three hours on the tramway about a year before the accident. On the morning of the accident he was sent to work on the tramway without instructions. He had been at work three hours, and was en-

gaged in pulling a car out into the yard at the time of the accident, while a fellow-workman pushed the car and operated the dumping apparatus. Another car had preceded the plaintiff's car, and was stopped and dumped at a little distance from the end of the tramway. As the plaintiff's car approached this car, the plaintiff, fearing, as he claimed, that his car would run into the forward car, turned around and attempted to stop his car by bracing himself and pushing against it. At the same time his fellow-workman dumped the car and the cross-arm descended and caught the middle of the plaintiff's foot between the end of the cross-arm and the planking of the tramway and crushed it. The plaintiff claimed negligence in so constructing the dumping apparatus that the cross-arm descended to a point so close to the planking as to crush the foot if it happened to be under it, and in not warning him of this fact.

The jury returned a general verdict for the plaintiff assessing his damages at $700, and also found in reply to special questions submitted by the trial court that (1) the defendant was chargeable with want of ordinary care in permitting conditions to be such that the cross-arm came as near the planking as it did; and (2) in not apprising the plaintiff of defects and dangers that he should not be held bound to discover; and (3) that the car was a new car. Upon motion the court set aside the jury's answers to the special questions and granted judgment for the defendant notwithstanding the verdict, and the plaintiff appeals.

W. P. Crawford, for the appellant.

For the respondent there was a brief by *Ross & Dwyer,* and oral argument by *F. A. Ross.*

WINSLOW, C. J. There was clearly no negligence in the manner of construction of the car. The dumping apparatus operated perfectly, and could not be said to be defective merely because the cross-arm descended to a point close to

the planking. In the ordinary and usual operation of the car the feet of the workmen would not be anywhere near the cross-arm, for the forward workman would be some distance ahead pulling on the rope and the car would stop itself when dumped, while the rear workman would be pushing on the top of the car from behind and his feet would inevitably be at some distance from the car; so it is difficult to see how an employer could reasonably apprehend that the foot of either workman could naturally get in such a position as to be caught under the cross-arm.

But if it should be held that there ought to be reasonable apprehension of such a contingency, this fact would not make the apparatus defective, but would only to tend to prove that there was a danger not readily observable of which an inexperienced employee should be warned in advance. As matter of fact, the dumping apparatus was in plain sight on the outside of the car, and the fact that the cross-arm descended very close to the planking was readily observable at every operation during the three hours the plaintiff had been at work. But it is argued that it cannot reasonably be held as matter of law that a new employee was bound to observe the danger during the three hours that plaintiff had worked on the car on the morning of the accident. This argument would be of weight had this been the first experience which the plaintiff had with the cars and had he testified that he had not noticed the danger; but it appears by his own testimony that he has really foreclosed himself from making this claim. The plaintiff testified that he worked upon the cars in the same capacity for twenty-three hours about a year before his injury; that he observed at that time that the trip or arm descended to within about two inches or two and one-half or three inches from the plank, so that if a man's foot got under the trip it would just about clear it; that the planking on the top of the tramway structure was not exactly level, but some planks might be three fourths of an inch higher than oth-

ers; and that when the cross-arm caught his foot it came within three fourths of an inch to an inch from the track. Thus he made it certain that he had observed the mechanism, that he knew there was only a space of about two inches left when the cross-arm descended, and that he knew the planking was uneven so that in some places the space would be three fourths of an inch less. It follows necessarily that he knew that in some places the space left would be only somewhere about an inch and one-fourth or an inch and one-half. It goes without saying that if the foot were caught in that space at about the middle there would be danger of serious injury, though probably not as much injury as the plaintiff in fact received, and, as it is only necessary that the employee should know and appreciate that there is serious danger and not the precise extent of the danger, it must be held that under the plaintiff's own testimony there was no duty to warn him of the possible danger when he was set at work.

It is true that the plaintiff testified that the car on which he worked was a new car, that the cross-arm descended somewhat lower than did the cross-arms of the cars on which he worked the year before, and that he supposed at the time that he was working on a car of the same pattern as those on which he previously worked. As it appears, however, that he was bound to anticipate the possibility of injury while working on the old cars, these facts become immaterial. The conclusion of the trial court seems to have been justified by the law and the facts.

By the Court.—Judgment affirmed.

SICARD, Respondent, vs. ALBENBERG COMPANY, Appellant.

October 21—November 10, 1908.

Contracts: Master and servant: Agreement as to compensation: Share of profits: Evidence: Instructions to jury: Special verdict.

1. A finding by the jury that plaintiff's services in conducting defendant's store were rendered under an agreement that he should receive therefor a specified sum per month and in addition twenty-five per cent. of the profits of the business, is *held* to be sustained by the evidence.
2. The error, if any, in admitting evidence that it was customary or common to compensate managers of similar stores by allowing them a share of the profits in addition to a fixed salary, is *held* to have been cured by the court striking out all such testimony and directing the jury to disregard it as completely as if it had not been given.
3. In an action upon an alleged contract an instruction to the effect that no form of words is necessary to constitute a contract, and that if the natural inference from what appears to have passed between the parties is that their minds met presently in agreement, as plaintiff claims, a valid contract was made, whatever may have been the verbal expressions used, was not prejudicially erroneous because of the use of the words "natural inference" instead of "reasonable inference."
4. Nor was such instruction erroneous on the ground that the jury might have supposed therefrom that they were permitted to find that a contract was made inconsistent with the words used by the parties.
5. The rule that, in charging the jury with respect to a special verdict, the court should not inform them as to the effect of their answers does not preclude the court from instructing the jury that if they answer a certain question in one way they need not answer a subsidiary question, where the jury must unavoidably see, without that instruction, that such answer to the primary question would necessarily terminate the controversy.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action to recover on contract. The issues involved Whether plaintiff rendered services for defendant in operating a store in Superior, Wisconsin, under an agreement that

he should receive as compensation therefor a specified amount per month and twenty-five per cent. of the profits, and, if so, the amount of profits earned during the period of employment.

The jury found in plaintiff's favor on the first proposition, also that the period of service was from May 28, 1906, to February 2, 1907, and that his share of the profits was $3,500. Judgment was rendered in favor of the plaintiff for the sum above mentioned with costs, and the defendant appeals.

H. W. Dietrich, for the appellant.

W. P. Crawford, for the respondent.

MARSHALL, J. We are unable to agree with counsel for appellant that respondent failed to produce sufficient evidence in support of his claim as regards a contract having been made that he should have twenty-five per cent. of the profits realized in operating appellant's store during the period of his services, in addition to a monthly salary. As we understand the record, the evidence of respondent is not fatally indefinite nor was the stipulation for a percentage of profits in any sense optional. His evidence in short is, that appellant, speaking by its representative who was really the proprietor of the business, proposed that upon a specified contingency it would employ respondent to assist in conducting its Superior store at the same monthly salary he had been receiving, and in addition twenty-five per cent. of the profits resulting from the business, which proposition respondent assented to; that the suggested contingency happened and thereupon, at appellant's request, respondent entered upon the work and continued in performance from that time, May 28, 1906, till February 2, 1907; that a few days after the term of service commenced respondent referred to the subject of his relation to the business, whereupon such representative said, substantially: You will draw the same salary

as heretofore and the rest will have to wait upon the outcome as regards whether the business proves profitable. "You know the agreement." Thus the evidence will be seen to have been positive and unequivocal. There were some corroborating circumstances and some evidence, direct and circumstantial, impeaching the case thus made by respondent. In that situation, that a jury question was presented is too plain to require discussion. The mere condition upon which respondent was to be allowed compensation in addition to his salary, viz., that of whether the business should prove profitable, is misnamed by counsel when it is referred to as an optional feature.

Some evidence was offered by respondent and received to the effect that it was customary to compensate managers of dry-goods stores by allowing them in addition to a fixed salary a share of the profits. Later that was stricken out and the jury directed to disregard it as completely as if it had not been given. Thereafter evidence was permitted under objection of the same character, except the word "common" was substituted for the word "customary" in the questions. Before the case was submitted to the jury that evidence and some cross-examination in regard to the matter were stricken out and the jury directed as before. It is claimed that such evidence was inadmissible and that the harm done by permitting the jury to hear it was not efficiently cured by the court's efforts in that regard. Whether the evidence was proper or not under the circumstances need not be discussed, since this court is clearly of the opinion that, in any event, no substantial ground exists for holding that the error, if there were one, was not cured so as to leave no reasonable probability of appellant's being prejudiced thereby.

Some other exceptions to the reception of evidence are referred to by counsel for appellant without discussion. However, they have received attention, resulting in the conclusion that the evidence was proper.

The court instructed the jury as to the question covering the controversy respecting whether the alleged contract was made or not, substantially as follows: No form of words is necessary to constitute a contract. If the natural inference from what appears to have passed between the parties is that their minds met presently in agreement, as plaintiff claims, a valid contract was made, whatever may have been the verbal expression used. It is suggested that the language is faulty because of the use of the word "natural" instead of "reasonable." That seems rather hypercritical. An inference could hardly be reasonable without being natural. The instruction was not happily worded, in that it used the word "natural" in the sense of "necessary." It were better to have instructed the jury that if they were satisfied from the evidence of what passed between the parties and their conduct, including the reasonable inference therefrom, that their minds met on an agreement in accordance with the question they should answer it "Yes," otherwise "No." The inference was evidentiary and not necessarily conclusive. However it is not thought that the inaccuracy of statement suggested could have been prejudicial.

It is further urged that the jury might reasonably have supposed from the instruction referred to, that they were permitted to find a contract was made inconsistent with the words used by the parties. It does not seem so. The fair meaning, and the one in our judgment which the jury in all reasonable probability gathered, is that notwithstanding the words used might not by themselves be sufficient to show satisfactorily that a contract was made as claimed, if they, in the light of all that passed between the parties, including their conduct, so satisfied them, then a contract as indicated in the question should be regarded as established.

The court further instructed the jury that if they answered the first question in the negative they need not answer the second, covering the subject of the amount of respond-

ent's percentage. It is claimed that such direction plainly informed the jury the effect of any determination they might reach as to the first question and so violated the rule on that subject. That rule does not go so far as to preclude the court from relieving a jury of the labor of determining a subsidiary question submitted, after reaching a conclusion on a primary one necessarily terminating the controversy as they must unavoidably see without a word being said to them on the subject. *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Banderob v. Wis. Cent. R. Co.* 133 Wis. 249, 268, 113 N. W. 738.

The foregoing covers all matters discussed in the brief of appellant's counsel requiring special mention.

By the Court.—The judgment is affirmed.

CLAPPENBACK, Appellant, vs. NEW YORK LIFE INSURANCE COMPANY, Respondent.

October 21—November 10, 1908.

Insurance: Construction of contract: Nonpayment of premiums: Election by insured of paid-up insurance: When takes effect.

1. A life insurance policy for $1,000, providing in effect for the application of surplus or reserve to payment for continuance of insurance after default in payment of premiums, stated that, upon written request therefor within six months from the date to which premiums were paid, the policy would be indorsed for the amount of paid-up insurance shown by a table, and that if no such request should be made the insurance would automatically continue from said date for the full amount of the policy for the term specified in the table. Default occurred October 20, 1906, after payment of several premiums. The amount of paid-up insurance specified in the table was $164, and the time for which the policy would be continued for $1,000 was six years and four months. On January 2, 1907, after correspondence with the assured, the company stamped upon the policy: "The premium due October 20, 1906, not having been paid, this policy is in-

dorsed for the reduced amount of paid-up insurance of $164 subject to the conditions of the policy . . . pursuant to the insurance law of the state of New York." On January 4, 1907, the insured died. The New York law and our statute (sec. 1955o, Stats. 1898) forbade any discrimination between insurants of the same class. *Held*, that by the terms of the policy the insurance for $1,000 continued for the full six months after the default, and an election of paid-up insurance, made within the six months, would become effective only at the end of that period; and that the indorsement should be construed accordingly. The company was therefore liable for the full amount of the policy.

MARSHALL, J., dissents from such construction of the policy, but concurs in the judgment on the ground that, as a result of the correspondence between assured and the company, any election to take paid-up insurance, other than one to take effect at the end of the six months, had been withdrawn by consent of the company.

2. Even an apparently unambiguous contract may be rendered ambiguous and open to construction if its words, taken literally, lead to absurdity or illegality when applied to the facts.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

Plaintiff's husband, Henry Clappenback, held a straight $1,000 life insurance policy with the defendant company, payable upon his death to the plaintiff, containing a clause for payment of tontine accumulation of profits at end of twenty years. He had paid premiums thereon for six years, up to October 20, 1906, but defaulted in payment of premium due at that date. The policy provided:

"This policy is automatically nonforfeitable from date of issue, as follows: If any premium is not duly paid, and if there is no indebtedness to the company, this policy will be indorsed for the amount of paid-up insurance specified in the table on the second page hereof, on written request therefor within six months from the date to which premiums were duly paid. If no such request is made, the insurance will automatically continue from said date for $1,000 for the term specified in said table and no longer."

In the schedule the amount of paid-up insurance was stated at $164, and the time that the policy would be continued for its face was stated at six years and four months, as a result of payment of premiums for six years.

Immediately after the premium of 1906 was due, to wit, on or about October 21st, the plaintiff, on behalf of her husband, went to the local office of the company and notified its agent, and told him that they wanted it indorsed for paid-up insurance. He told her that it was good for thirty days and she had better wait for that period, and on the 20th of November he again told her that it was good for one day more. On the 21st of November she delivered the policy to him for the purpose stated, and it was sent to the office of issue in Chicago with an application for such indorsement. Several letters passed between the parties, in which the company offered generally to advise, but gave no information, until in December they suggested that assured might as well have waited until April 20th and had benefit of the whole $1,000 insurance meanwhile. Whereupon the plaintiff replied by letter on December 22, 1906, declaring misunderstanding and expressing desire to preserve all rights. Defendant, however, on January 2, 1907, stamped upon the face of the policy: "This policy is indorsed for paid-up insurance under the conditions of the statement on the next page," and on the next page indorsed, by rubber stamp form, "The premium due October 20, 1906, not having been paid, this policy is indorsed for the reduced amount of paid-up insurance of one hundred and sixty-four dollars ($164) subject to the conditions of this policy, but without further payment of premiums, and without loans, participation in surplus and premium return, pursuant to the insurance law of the state of New York," and mailed it to the insured. On January 4th, before his receipt of the indorsed policy, the insured died of an acute illness.

The plaintiff, after making proofs of loss, sued for $1,000.

The defendant tendered $164. The action was tried to the court without a jury, and the court found as a fact that Clappenback made his election to choose a paid-up policy and thereby waived all other provisions, and that the correspondence did not constitute a countermand of that election, and accordingly rendered judgment for plaintiff for the less amount, and in favor of the defendant for the costs incurred subsequent to the tender, from which judgment plaintiff appeals.

H. W. Dietrich, for the appellant.

For the respondent there was a brief signed by *Grace & Hudnall,* attorneys, and *James H. McIntosh* and *John Kirkland Clark,* of counsel, and oral argument by *G. B. Hudnall.*

DODGE, J. The first and most important question is that of the true construction of the so-called automatic nonforfeiture clause quoted in the statement of facts. This policy provided for payment of premiums considerably in excess of the cost of carrying the insurance, whether as fixed by the laws of New York or as ascertained by defendant's actuaries. It therefore contemplated that at all times after the first payment the insured would have in the defendant's hands a certain surplus or reserve fund belonging to him, which, but for agreement to the contrary, he should equitably have a right to withdraw upon discontinuance of the insurance. This policy provided against such withdrawal and, in effect, that defendant should keep this fund, and in consideration thereof that it would continue the insurance of $1,000 for six years and four months. The policy, however, gave the assured an election to commute such $1,000 insurance for a limited time into paid-up life insurance of $164, on written request made within six months after default in premiums. The amount was to be the same whether he gave that notice at the beginning or the end of the six-months period. That is, the assured at least could, if he chose, perpetuate the $1,000 liabil-

ity up to the end of the six-months period; and it is therefore certain that the company's actuaries computed and deducted the cost of $1,000 for the whole of that period in order to ascertain the amount of the surplus which it would apply to paid-up insurance. Of course the cost of $1,000 insurance for six months is more than for one month, and for any given term it is greater than the cost of $164 insurance for the same term. It is therefore obvious that on January 2d less of Clappenback's surplus had been exhausted than would have been on April 20th, and upon a fair commutation the balance would have purchased a larger amount of paid-up insurance. The statutes of New York, when this policy was written, forbade all discrimination between policy-holders of the same class, and required that paid-up insurance be accorded to the full amount that the existing reserve would purchase at the established rates. Ch. 85, Laws of 1898. Whether such foreign statute was properly before the court or not, the general policy thereby expressed is part of the law of this state. Sec. 1955*o*, Stats. (1898). This contract, as construed by defendant and by the trial court, would be in defiance of the policy of these statutes. It would give to one who declared his election before the six months had expired less insurance than to another, similarly situated, who withheld such declaration till the end of that period. It would give to the former less insurance than his reserves would purchase at established rates, if $164 was the correct amount purchasable by the reserves at the end of six months. Even an apparently unambiguous contract may be rendered ambiguous and open to construction if its words, taken literally, lead to absurdity or illegality when applied to the facts. *Rice v. Ashland Co.* 108 Wis. 189, 193, 84 N. W. 189; *Rossmiller v. State,* 114 Wis. 169, 178, 89 N. W. 839; *Loper v. Sheldon's Estate,* 120 Wis. 26, 97 N. W. 524; *Pape v. Carlton,* 130 Wis. 123, 109 N. W. 968; *State ex rel. Williams v. Samuelson,* 131 Wis. 499, 505, 111 N. W. 712.

But we do not think this contract clear and unambiguous. It nowhere expressly declares when the substitution of paid-up for term insurance shall take place; merely that the term insurance shall persist unless the written request for full-paid insurance be made within six months. It also, by clearest implication, provides that the company shall take out of the reserve and retain full payment for six months $1,000 insurance immediately on happening of the default. We think the implication is plain that the insurance liability shall continue during that whole six-months period, regardless of when assured shall make up his mind that for the future he prefers the full-paid insurance for the smaller sum. The policy contemplates the act of election as one likely to take place at any time within the six months; but to hold that the parties intended that by the act of election the absolute liability for $1,000 insurance which assured had paid for should be reduced to a liability no more absolute and no different in character during the rest of the six months of only $164 involves the absurdity that both parties assumed the likelihood that the assured would for no consideration whatever surrender $836 of the absolute $1,000 of liability. Such an act with reference to a promissory note would be absolutely void for want of consideration. It is unbelievable in case of a contract like this. We think no purpose could have honestly or legally been intended expression by the words used, save that both parties were bound without option to continuance of the full insurance for six months, and that the option of assured was to choose between the two equivalents: continuance of $1,000 insurance after that time for a specified period or $164 for his life; that, in other words, the option could not apply to the period during which his rights were fixed independent of any choice or election by him.

This view is entirely consistent with, and, we think, confirmed by, the indorsement in fact made on the policy as

quoted in the statement of facts. Had the intention been to declare $164 of paid-up insurance from that date in present substitution for the pre-existing contract, it was easy to say just that in few words. Instead of that it is declared that it is "indorsed for" paid-up insurance of $164, "subject to the conditions of this policy" and "pursuant to the insurance law of New York." It also recites the date of default in premium, which is of no relevancy to a new agreement for present change to a paid-up policy. That date, however, is relevant and significant if "indorsed for paid-up insurance" means shall become effective for paid-up insurance, subject to the conditions of this policy and pursuant to the insurance laws of New York, to wit, at the end of the six-months period from such date of default, for which period the company has taken payment for maintaining $1,000 insurance and at which time the $164 will be the amount of full-paid insurance purchasable at established rates by the sum of the amount of reserves or surplus of premiums paid by assured. That is what the indorsement ought to mean, and, since it is fairly susceptible of such construction, we think that is what it does mean.

We conclude that at the time of the death of Henry C. Clappenback, January 3, 1906, the policy was in full force as insurance for $1,000, and it is therefore unnecessary to consider whether he had effectively withdrawn his election to substitute paid-up insurance before the defendant had acted upon it.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in plaintiff's favor for $1,000, with interest and costs.

MARSHALL, J. (*concurring*). I concur in the result reached by the court in this case, but dissent from the grounds upon which such result is based and the reasoning in support thereof. To my mind the provision of the insurance con-

tract discussed in the court's opinion is unambiguous. The language "If any premium is not duly paid, . . . this policy will be indorsed for the amount of paid-up insurance specified," etc., "on written request therefor within six months from the date to which premiums were duly paid. If no such request is made, the insurance will automatically continue from said date for $1,000 for the term specified," etc., is about as plain, it seems, as English words can well be.

The assured was given the option of $1,000 of insurance for a limited time or the smaller amount absolutely, the former to be regarded as his choice in the absence of notification to the contrary within six months. Facing that plain language, to hold that the assured was given his option to have absolute insurance for $1,000 for the limited time with the option to substitute therefor the smaller amount of absolute insurance at the end of six months by notice to the company within such time, seems to be a plain judicial change of the contract the parties made for themselves rather than a construction thereof.

The reference to the New York law prohibiting discriminations and its application in support of the court's decision, the theory being that any other construction of the contract would be a violation of such law, seems illogical, since, so long as every policy-holder of the class is given the same option, as is manifestly the case, there cannot be, in the very nature of things, any discrimination in holding the parties to the plain terms of the writing.

Notwithstanding the foregoing it was doubtless competent for the company to relieve the assured from any mistake he may have made in making his election to take absolute insurance and surrendering his privilege as to the greater insurance for a limited time, long before the expiration of the period within which he was required to act in the matter expired. The company acted commendably in writing assured, calling attention to his apparent mistake and expressing the

hope that he would correct it before it was too late. That plainly and legitimately held out an offer to the assured of a reasonable time to make the correction. The only correction that could have been in the minds of the parties was a suspension of the election already made to take absolute insurance till about the time limited for action in the matter. The assured seasonably replied to the company's communication, notifying it that he desired all the advantages which the contract gave him. That cannot reasonably be construed otherwise than a correction of the mistake in making an early election; a withdrawal or modification thereof to the end that it might take effect only at the termination of the six months; the doing of the very thing which the company suggested to the assured he ought to do in his own interest while there was yet time given him by the favor of the company for that purpose. Such being the case, the company acted in fraud of the rights of the assured and the beneficiary in treating the election as not withdrawn. There was in fact no election at the time the assured died except one to take effect at the end of the six months. Therefore a recovery should have been allowed in accordance with the conclusion which the court has reached.

CAYOUETTE, Administrator, Respondent, vs. EMIL T. RADDANT BREWING COMPANY, Appellant.

October 22—November 10, 1908.

Appeal: Review: Motion for new trial: Bill of exceptions: Depositions: Notice: Objection, when to be made: Contracts: Sale: Statute of frauds.

1. Error assigned on denial of a motion for new trial on the ground that the verdict was contrary to the evidence cannot be considered or the evidence reviewed on appeal where the bill of exceptions does not show that any such motion was made.

2. Under sec. 4091, Stats. (1898), the objection that sufficient notice of the taking of a deposition was not given must be made before entering on the trial.
3. Even if an oral contract under which defendant furnished saloon fixtures to plaintiff to be paid for in monthly instalments was void under the statute of frauds because not to be performed within one year, yet, after plaintiff had made payments thereon, if defendant wrongfully took and converted the fixtures plaintiff could recover the amount paid.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff was running a saloon under an agreement with the defendant by the terms of which the plaintiff agreed to pay for the fixtures advanced by defendant in instalments of $5 per month and also pay $15 a month on rent of the premises. The claim of the plaintiff in this action as set up in the complaint is to the effect that, after he had performed the agreement to the extent of paying $265 on the fixtures, the defendant, in violation of its agreement, dispossessed plaintiff, converted the fixtures and sold them to another, and refused to perform or permit plaintiff to perform on his part; that plaintiff duly tendered performance, which was refused, and demanded return of his money, which was likewise refused. The issues were tried before the court and a jury, and the jury found in favor of plaintiff. Judgment was rendered on the verdict, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *P. J. Winter,* and for the respondent on that of *Eberlein & Eberlein.*

KERWIN, J. The appellant assigns the following errors: (1) That the court erred in not granting the motion of the defendant for a new trial on the ground that the verdict was contrary to the evidence: (2) that the court erred in receiving the deposition of one Joseph Cayouette, for the reason

that no sufficient notice of the taking of said deposition had been served upon the defendant or his attorney; (3) that the court erred in denying the defendant's motion to dismiss the action, for the reason that the case was tried upon the theory of a valid contract, and that such contract was not to be executed within one year and was therefore void.

The first assignment of error cannot be considered. We cannot review the evidence in this case, since there is nothing in the bill of exceptions going to show that any motion for a new trial was made. The sufficiency of the evidence is the only question arising under the first assignment of error; hence this error is not available to defendant.

On the assignment of error that the court erred in receiving the deposition there is nothing in the bill of exceptions showing what notice was given. Nor does it appear that any motion was made before entering upon the trial to suppress the deposition or to take advantage of defect in service of notice, if any existed. The objection that sufficient notice was not given could not be raised for the first time when the deposition was offered upon the trial. Sec. 4091, Stats. (1898); *University of Notre Dame du Lac v. Shanks,* 40 Wis. 352.

The appellant further assigns error upon the theory that the contract between plaintiff and defendant was within the statute of frauds and void. This assignment is not available for the reason that, even if it be conceded that the contract was void when made, it was executed to the extent that $265, the amount of money claimed in this action, had been paid under the contract by plaintiff to defendant. Therefore, so far as this case is concerned, it is wholly immaterial whether the contract, while executory, was void under the statute of frauds or not. We find no error in the record; therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

FERGUSON, by guardian *ad litem,* Respondent, vs. TRUAX, imp., Appellant.

October 22—November 10, 1908.

Evidence: Experts: Hypothetical questions: Impeachment of witness: Carriers: Negligence: Personal injury: Fall of passenger elevator: Special verdict: Degree of care required of owner: Instructions to jury: Questions for jury: Improper remarks of counsel: Damages.

1. Hypothetical questions to expert witnesses should be such that the jury can distinctly understand the exact facts upon which the witnesses base their opinions. That rule was violated in this case by questions to medical experts in which was assumed the truth of complicated, voluminous, and conflicting evidence.
2. Testimony that an expert witness had, prior to the trial, intimated in certain conversations that if he were paid for his time and expenses by either party he would, if necessary, testify falsely for such party, was not competent to impeach such witness until foundation had been laid therefor by asking the witness specifically whether he had made such a statement, specifying details and calling attention to time, place, and occasion.
3. In an action for injuries sustained by a boy through the fall of a passenger elevator in an office building, the issue as to whether he was riding in the elevator for mere pastime or for the purpose of going to a doctor's office to ascertain if the doctor had work for him, is *held,* in the light of the facts and circumstances, to have been sufficiently submitted to the jury by the question in the special verdict, "Was the plaintiff at the time of the accident on his way to Dr. T.'s office to visit the doctor?"
4. The owner of an office building, maintaining therein a passenger elevator, is bound to exercise in keeping such elevator in a safe condition the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct of such business under the same or similar circumstances. An instruction stating the standard to be "such care as a *very* prudent and skilful man would ordinarily use in a similar case," etc., is *held* erroneous.
5. Whether in this case defendant had failed to use the required degree of care to keep the elevator in a safe condition, and whether a want of ordinary care on plaintiff's part contributed to produce his injuries, are *held* to have been questions for the jury.

6. Although plaintiff's own testimony at the different trials and on a prior examination was contradictory and conflicting on the questions whether he was riding in the elevator for amusement or was on his way to a doctor's office and whether he had been forbidden by defendant's agents to ride in the elevator, yet since it was not obviously false in the light of reason and common knowledge or because contradicted by well known physical facts, its weight and credibility were to be determined by the jury in connection with the testimony of other witnesses.
7. Remarks by plaintiff's counsel to the jury as to a witness for defendant having been induced by money to testify falsely, and as to other matters, are *held* unwarranted by the evidence and prejudicial as tending to inflame the minds of the jury.
8. Whether the amount of damages found by the jury in this case was excessive is not determined; but MARSHALL, J., is of the opinion that, upon evidence substantially the same as that given upon the two trials already had, damages in excess of $8,000 could not be approved.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

The issues involved in the case, the facts respecting the location of the elevator in defendant's building, its construction, manner of operation, its use by the occupants of the building as tenants of the defendant, and the facts bearing on defendant's neglect to keep the elevator in a reasonably safe condition for carrying passengers are stated in detail in the report of the case on the former appeal (132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513), and need not be restated here. It appears that the plaintiff, the elevator boy, Louis Larson, and Claude Luse, occupied the elevator as it started on its upward trip; that it did not stop at any of the floors on its upward trip; that it ran against the shive timber, breaking parts of it; and that it became detached from the cable and dropped to the bottom of the elevator shaft with these three occupants. Plaintiff testified that he did not know what occurred thereafter until he was assisted from the elevator at the bottom of the shaft. He testified that he entered the elevator on this trip to go to Dr. Thompson's offices in the building for the purpose of ascertaining whether

the doctor had anything for him to do, and that he had prior to this day been at Dr. Thompson's offices, had done some errands for him, and that he had been asked by the doctor to call every morning to do work for him. He also testified that he has suffered much pain since the accident and injury and that his strength and health have been much impaired. Dr. Sazarin, plaintiff's attending physician, testified that he saw the plaintiff within a short time after he had been taken to his father's home, made an examination, and found him very weak and afflicted with a partial suspension of his bodily functions; that Dr. Adams was called to his assistance; that they administered an anæsthetic, thoroughly examined plaintiff, and found he had been injured in the chest and region of the spine (fully described in the former appeal at 132 Wis. 493, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513).

The case was submitted to the jury by special verdict and they found: (1) That the defendant, *Truax,* had failed to use the highest practicable degree of care to keep the elevator in an ordinarily safe condition for carrying passengers; (2) that the want of such care was the proximate cause of plaintiff's injuries; (3) that plaintiff at the time of accident was on his way to Dr. Thompson's office to visit the doctor; (4) that plaintiff had not been prohibited by any of *Truax's* agents from riding in the elevator; (5) that no want of ordinary care on plaintiff's part contributed to produce his injuries; (6) the sum which would compensate plaintiff for the damages sustained by him on account of his injuries. The court awarded judgment for plaintiff for the amount assessed by the jury and costs. This is an appeal from such judgment.

For the appellant there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.*

For the respondent there was a brief by *Ross & Dwyer,* and oral argument by *F. H. Ross* and *W. D. Dwyer.*

SIEBECKER, J. 1. The appellant urges that the hypothetical questions propounded to four doctors respecting the cause of plaintiff's present condition of health and the progressive character and permanency of his illness, besides assuming certain specific facts, embraced an assumption that the plaintiff's evidence as to his height, weight, nervous condition, pain, the suffering endured by him up to the time of the trial, and his ability and inability to work was true. From an examination of the record it appears that the evidence of the plaintiff was conflicting and contradictory upon the subjects covered by the hypothetical questions as to his nervous condition, the amount of pain and suffering he had endured, and his ability to work. In some of the questions the truth of like evidence of the father of plaintiff and of the evidence of Drs. Sazarin and Adams bearing on his condition and health was assumed. The doctors to whom these questions were propounded had attended the trial and heard the evidence of plaintiff, his father, and the doctors upon the subjects included in the hypothetical questions. The evidence on these subjects is so complicated and voluminous that a difference in understanding the material facts is so probable as to raise doubts as to what facts were considered as true when these experts gave their opinions. These conditions render it well-nigh impossible to ascertain upon what facts the experts based their opinions. Such a state of the case renders the opinions given uncertain and unreliable, and likely resulted to the great prejudice of the party against whom it operated. As was declared in *Bennett v. State,* 57 Wis. 69, 14 N. W. 912: "The jury should in every case distinctly understand what are the exact facts upon which the expert bases his opinion." This and other cases in this court clearly point out the necessity of stating the facts in the hypothesis in this class of cases, and show that a failure so to do is prejudicial. *Cornell v. State,* 104 Wis. 527, 80 N. W. 745, and cases there collected.

2. The deposition of the witness Irwin was offered and received to impeach Dr. Thompson. It appears from this deposition that conversations had been held between them as to Dr. Thompson being a witness for the plaintiff on the trial of this case. Irwin states, in effect, that Dr. Thompson intimated to him in these conversations that if he were paid for his time and expenses by either party he would, if necessary, testify falsely for such party. To make this evidence competent as impeaching evidence it devolved on plaintiff to lay the foundation by asking Dr. Thompson specifically whether he had made such a statement, specifying the details and calling attention to the time, place, and occasion, and, if the doctor denied having had such a conversation or failed to answer the inquiry, then Irwin's testimony of them would be admissible for impeachment. This foundation was not laid, and Irwin's evidence was erroneously received for the purpose of impeachment. *Dufresne v. Weise,* 46 Wis. 290, 1 N. W. 59; *Stone v. N. W. S. Co.* 70 Wis. 585, 36 N. W. 248; *Hunter v. Gibbs,* 79 Wis. 70, 48 N. W. 257. Respondent's counsel insists that Irwin's deposition as to these conversations was properly admitted as impeaching evidence under a stipulation made before the trial, and relies upon letters between him and appellant's counsel containing such a stipulation. This claim is not conceded by counsel for appellant, and counsel have presented nothing in the record sustaining this claim, nor has examination of the record disclosed anything to support it. Under these circumstances we cannot assume that such a stipulation exists.

3. Upon the issue of whether or not the plaintiff at the time of accident was riding in the elevator for pastime or amusement, or for the purpose of going to Dr. Thompson's office to ascertain if the doctor had any work for him, the court submitted the following question: "Was the plaintiff at the time of the accident on his way to Dr. Thompson's office to visit the doctor?" The court refused to submit the fol-

lowing additional question requested by appellant: "Had Dr. Thompson, prior to the accident, invited plaintiff to come to his office?" No instructions were given to the jury upon the question so submitted to them. It is argued that an affirmative answer to the question submitted in no way informs the court whether the jury found that plaintiff took the elevator to go to Dr. Thompson's office for the purpose of rendering services for the doctor or merely did so for his amusement and pastime. The question and answer must be considered in the light of the facts and circumstances of the case. Plaintiff testified that he went to the doctor's offices, pursuant to a previous arrangement, to ascertain if the doctor wanted some service rendered. The defendant denies that any such arrangement existed, and asserts that plaintiff theretofore had rendered no services for the doctor. From the evidence it is apparent that the jury must have arrived at one of two alternatives—either that plaintiff was on his way to the doctor's offices in response to his invitation, or that he was not on his way to the doctor's offices, but was merely riding in the elevator for his pastime or amusement. Under these circumstances the finding is sufficiently definite and clear to establish the fact that the jury found that plaintiff took the elevator to go to the doctor's offices for the purpose testified to by him, and that the visit was not a mere pretense for riding in the elevator for his pastime and amusement.

4. Exception is taken to the instruction defining the degree of care imposed on defendant to keep the elevator in an ordinarily safe condition for carrying passengers. The court instructed the jury:

"By the 'highest practicable degree' of care is meant such care as a very prudent and skilful man would ordinarily use in a similar case under the same or similar circumstances."

On the former appeal of the case (132 Wis. 478, 490, 110 N. W. 399) the court referred to the case of *Oberndorfer v. Pabst,* 100 Wis. 505, 76 N. W. 338, as declaring that:

"It is the duty of the proprietor of an office building to see that the passenger elevators operated by him therein are properly and safely constructed, and that they are operated with the highest degree of skill and care commensurate with or proportionate to the possibility of injury to passengers using them."

It is also stated in the opinion on the former appeal in this case that the standard of care respecting safety in the operation of passenger elevators is the same as that exacted of passenger carriers by railroad. As to the standard of care demanded of the latter, the following taken from Fetter on Carriers was approved as expressing the rule on the subject:

"For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business." 1 Fetter, Carriers, § 8.

Expressing the elements of this rule in other terms, it imposes on carriers of passengers the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct of such business under the same or similar circumstances. The instruction given by the court imposes as the standard of care that which is ordinarily exercised by the *very* prudent and skilful man. The instruction embraces the elements of similar circumstances and usual conduct of a class of men, but imposes the standard of care which is exercised by the very prudent and skilful class of men instead of the ordinarily prudent and skilful class of men. This exacts a higher degree of care of defendant in operating this elevator than the law imposes. Reliance is placed on the language used in *Wanzer v. Chippewa Valley E. R. Co.* 108 Wis. 319, 84 N. W. 423, wherein the special verdict and the charge are criticised as imposing a wrong standard of care on carriers of passengers. It is urged that the charge and special verdict in the instant case

are in effect the same as in that case and therefore erroneous. The criticism of the charge and the verdict in the *Wanzer Case* does not specifically point out what language there employed in defining the standard of care involved in the case was held misleading to the jury, and the grounds of criticism are therefore somewhat obscure. It is, however, manifest that the court adopted and approved the standard of care imposed on carriers of passengers as embodied in the quotation above taken from 1 Fetter on Carriers of Passengers, § 8.

The respondent contends that this erroneous instruction was not prejudicial because the court should have held as matter of law that defendant was negligent as found by the jury. We cannot approve this contention under the facts and circumstances of the case, nor do we find justification in the record for defendant's claim that there is no credible evidence showing negligence. The facts and circumstances material to this question are such that the jury might well have drawn different inferences respecting defendant's care in keeping the elevator in an ordinarily safe condition for carrying passengers, and the question was properly submitted to the jury for determination. *Ferguson v. Truax,* 132 Wis. 478, 488, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513.

5. Appellant contends that the verdict covering the litigated questions whether or not plaintiff at the time of accident was on his way to visit Dr. Thompson at his office, and whether or not he had prior thereto been forbidden by defendant's agents to ride in the elevator, is not supported by the evidence. It is conceded that plaintiff testified to facts tending to support these findings, but his testimony upon the different trials and the preliminary examination is vigorously assailed as of no weight and credibility because of its many contradictions and conflicts upon many material phases of the case. We need not specify these alleged conflicts and contradictions. It is manifest that they exist. The appellant's contention is, in substance, that plaintiff's evidence is

removed out of the field of credibility upon the ground that its weight and credibility are destroyed by its contradictions and conflicts, and because his evidence is impeached by the evidence of other witnesses. This claim is not of that class wherein the evidence of a party is obviously false in the light of reason and common knowledge and because it is contradicted by well known physical facts. The credibility of plaintiff's evidence must be determined by the weight and credibility of the conflicts and contradictory statements of the plaintiff and the other witnesses in the case. The inquiries thus presented embrace many ingredients dependent upon the evidence of the plaintiff and the respective witnesses and the weight of their testimony upon the subjects involved. Determination of these questions is peculiarly within the province of the jury as the tribunal to which is committed the trial of the facts. We are of opinion that the court properly submitted the issues covered by questions 3 and 4 to the jury for determination. We are also satisfied that the question of contributory negligence on the part of plaintiff was properly a question for the determination of the jury.

6. Complaint is made on account of remarks made by plaintiff's counsel to the jury to the effect that Dr. Thompson had been induced to testify falsely in consideration of money paid him by the defendant, and another statement by counsel that Dr. Sazarin had testified that plaintiff's hands were not burned by contact with the elevator hand cable when the elevator fell. The facts of the case furnish no justification for such remarks. These, as well as other remarks which the trial court condemned in its ruling, show that counsel transgressed the proper limits in presenting the case to the jury. In the very nature of the case they would tend to inflame the minds of the jury and tend to arouse them to action controlled by prejudice, to the injury of the defendant.

Upon consideration of the foregoing assignments of error it necessarily follows that the verdict and judgment cannot

stand and that a new trial must be granted. We need not consider other questions raised and argued.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

The following statement was added to the opinion December 4, 1908:

PER CURIAM. In view of the fact that it was necessary to order a new trial of the case for errors committed on the trial, this court deemed it advisable not to consider the question of whether or not the amount of damages found by the jury was excessive, and therefore that question was not decided, though an exception thereto was presented and fully argued on this appeal of the case.

MARSHALL, J. (*concurring*). This case has now passed in review twice before this court. It has been pending a long time. In the very nature of things the litigation will be extremely burdensome to both sides before the rights of the parties can be finally established. For that reason it seems to the writer, every question now before us which will be material upon another trial should be met, to the end that, so far as possible, the way may be cleared for a final determination of the controversy.

Upon the first appeal the finding in favor of plaintiff of $8,000 was challenged as excessive. That challenge was not resolved in plaintiff's favor without considerable difficulty. Enough was said in the opinion to indicate that the amount was well up to the limit of what could receive judicial approval. It could not have been justified except upon the theory that plaintiff, as the jury were permitted to find from the evidence, was permanently and well-nigh completely disabled. Facing that situation the court remarked that while the recovery was not so clearly excessive as to require con-

demnation, it "was very large." That language was used, as the writer understood, as a suggestion which the trial court might refer to in reviewing a second verdict. The nature of the case was such that it did not seem probable that any additional evidence could or would be produced indicating a worse state of things than was testified to upon the first trial. As I view the evidence in the second record it is substantially the same as the first. If it could be well said that there is more evidence now than before as to the disability it only goes to support, or rather furnish a stronger justification than before for, a finding that the plaintiff was permanently injured to an extent substantially wholly disabling him. When a finding is based upon such a theory no justification can be created for a large increase in the recovery by producing additional evidence in support of it. So if the former recovery was on the border line between the reasonable and unreasonable, the second finding increasing the amount of the recovery from $8,000 to $12,000 should, as it seems, be unhesitatingly condemned.

It is not infrequent that upon a judgment, in a case of this sort, for damages well-nigh great enough to shock the sense of what is just, being reversed and a new trial had with substantially the same evidence, the amount is greatly increased; the circumstances strongly suggesting a penalizing of defendant for vindicating his right to the reversal, leading necessarily to an imposition upon plaintiff of an additional burden as a consequence of the vindication to establish his rights, which burden could not legitimately be cast upon the defendant to any greater extent than the taxable costs of the additional proceedings.

It is most unfortunate that under our system for remedying wrongs of the nature of the one in question the realizable indemnity to the injured party is often small as compared with the amount which the defendant is compelled to pay, but the defect in the system is not one attributable to defend-

ants and should not be cast upon them by any notion of equity which, without legal warrant, aims to add to the pecuniary loss suffered by a plaintiff from the injury itself, an amount sufficient to make good to him not only such pecuniary loss but the burden of vindicating his rights, in addition to the taxable costs. It were better if that burden could be in me way very much lightened, but the method must be provided by the legislature, not by casting such burden upon the defendant through illegitimate administration.

The court at this time has seen fit not to deal at all with the question of whether the verdict is excessive or not, though it is raised and has been fully argued. In the light of the result on the first appeal it is the law of the case, as I view it, that a recovery of $8,000 on a case such as that made on such appeal "is very large." I take that as meaning, substantially, that such amount would be up to the limit of what could be justified. So it seems to me that it would be well to lay down upon this appeal, as has been done on other occasions, to the end that justice may be attained as speedily as possible and with as little burden to the parties as practicable, that if plaintiff recovers upon evidence substantially the same as has been twice produced, damages in excess of $8,000 cannot be approved.

TALLMAN, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

October 22—November 10, 1908.

Railroads: Loss of passenger's baggage: When liability as carrier ceases: Reasonable time for removal.

1. What constitutes a reasonable time for the removal of baggage, after which the carrier ceases to be liable as such for its loss, depends upon the facts and circumstances of each particular case.

2. Plaintiff arrived at Janesville at about 5 p. m. on Sunday. His valise, which had been checked and had come on the same train, was too heavy for him to carry, and there were no conveyances at the station. He gave his duplicate check to defendant's baggage master and said that he would send for the valise that evening or the next morning. The baggage master removed the check from the valise and placed it in the baggage room. It would have been very inconvenient for plaintiff to call for the valise that evening, even if he could have secured a conveyance. He sent for it at about 8:30 or 9 o'clock the next morning, at which time certain articles which had been in the valise were missing. *Held*, that the baggage had been called for within a reasonable time, so that defendant had not ceased to be liable as a common carrier. *Minor v. C. & N. W. R. Co.* 19 Wis. 40; *Hæger v. C., M. & St. P. R. Co.* 63 Wis. 100; and *Goldberg v. A. & W. R. Co.* 105 Wis. 1, distinguished.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action was commenced in justice's court and the plaintiff recovered judgment. It was tried on appeal in the circuit court by the court, a jury having been waived. Plaintiff claims damages for loss of baggage checked from Edgerton to Janesville, Wisconsin. The circuit court found that defendant was liable as a common carrier for the loss of articles mentioned in the complaint, and that plaintiff was entitled to recover $89.29, the value thereof, with interest and costs. Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Chas. E. Vroman* and *Thos. S. Nolan,* and for the respondent on that of *Claude J. Hendricks.*

Counsel for appellant cited *Mote v. C. & N. W. R. Co.* 27 Iowa, 22, 1 Am. Rep. 212; *Kansas City, Ft. S. & M. R. Co. v. Patten,* 3 Kan. App. 338, 45 Pac. 108; *Nealand v. B. & M. R. Co.* 161 Mass. 67; *Powell v. Myers,* 26 Wend. 591; *Burnell v. N. Y. Cent. R. Co.* 45 N. Y. 184, 6 Am. Rep. 61; *Roth v. B. & S. L. R. Co.* 34 N. Y. 548; *George F. Ditman B. & S. Co. v. K. & W. R. Co.* 91 Iowa, 416; *Chicago, R. I. &*

P. R. Co. v. Boyce, 73 Ill. 510, 24 Am. Rep. 268; *Ouimit v. Henshaw,* 35 Vt. 605, 84 Am. Dec. 646; *Jacobs v. Tutt,* 33 Fed. 412; *Texas & Pac. R. Co. v. Capps,* 2 Tex. Ct. App. 35, 16 Am. & Eng. R. Cas. 120; *Jones v. Norwich & N. Y. T. Co.* 50 Barb. 193; *Matteson v. N. Y. Cent. & H. R. R. Co.* 76 N. Y. 381; *Hæger v. C., M. & St. P. R. Co.* 63 Wis. 100; *Chesapeake & O. R. Co. v. Beasley,* 104 Va. 788, 52 S. E. 566; Angell, Carriers, § 114; Pierce, Railroads, 499; Hutchinson, Carriers, secs. 707–710; 2 Fetter, Carriers, § 614; *Mortland v. Phil. & R. R. Co.* 30 N. Y. Supp. 1021; *Graves v. Fitchburg R. Co.* 51 N. Y. Supp. 636; *Wiegand v. Cent. R. Co.* 75 Fed. 370; *Goldberg v. A. & W. R. Co.* 105 Wis. 1; *Minor v. C. & N. W. R. Co.* 19 Wis. 40.

For the respondent it was argued, among other things, that, without reference to the question of reasonable time, the liability of the defendant as an insurer was continued by reason of the arrangement made by the plaintiff for the care of his baggage by the defendant. *Curtis v. A., G. & Mt. M. R. Co.* 49 Barb. 148; *Dininny v. N. Y. & N. H. R. Co.* 49 N. Y. 546; *Matteson v. N. Y. Cent. & H. R. R. Co.* 76 N. Y. 381; *Ouimit v. Henshaw,* 35 Vt. 605, 84 Am. Dec. 646; *Powell v. Myers,* 26 Wend. 591; *Burgevin v. N. Y. Cent. & H. R. R. Co.* 23 N. Y. Supp. 415. Under the circumstances of the present case a reasonable time had not elapsed between the time of plaintiff's arrival and the time at which he sent for the baggage, so as to terminate the strict liability of the defendant as an insurer. *Burgevin v. N. Y. Cent. & H. R. R. Co.* 23 N. Y. Supp. 415; *Kansas City, Ft. S. & M. R. Co. v. Patten,* 3 Kan. App. 338, 45 Pac. 108.

Kerwin, J. The question involved is whether the liability of the defendant as common carrier continued until the time of the delivery of the telescope or grip in question to plaintiff's teamster on the morning of June 25, 1906. It appears from the established facts that the plaintiff checked

his grip at Edgerton on Sunday, June 24th, and took passage on the same train to Janesville, and arrived at the latter place shortly after 5 p. m.; that the telescope or grip was too heavy for plaintiff to carry, besides he had other baggage; that there were no conveyances at the station; that the telescope was in good condition when it arrived at Janesville, and that plaintiff saw the baggage master, handed him the duplicate check, and told him to keep it until he sent for it, and that he would send for it that evening or the next morning; that the baggage master took the check to enable him to "make up his books," and placed the baggage in the baggage room of defendant, removed the duplicate check from the telescope, matched it with the duplicate handed him, and put them on a strap as is usual. The baggage master on the evening in question left for home between 5:20 and 6 o'clock, which is the custom on Sunday, and the baggage room was left in charge of the flagman. Soon after 9 o'clock the flagman left for home, and when he left he either locked the door or the defendant's call boy was there. There is evidence that at times the door of the baggage room was left unlocked when no one was in, and that the night man left it open at times when he went some distance from the room. It also appears that plaintiff looked about for a conveyance to convey his grip to his home, but could find none, and that hacks and drays did not meet Sunday trains; that plaintiff arranged with the baggage master to leave his baggage until the following morning, and this was customary where the baggage master was known to the owner of the baggage as in this case. Other facts and circumstances appear in the record going to show that it was very inconvenient for plaintiff to call for his baggage that evening, even if he could have secured a conveyance to remove it. It is also established by the findings and the evidence that the telescope or grip contained a large number of valuable articles; that on the following Monday morning about 8:30 or 9 o'clock plaintiff sent

a conveyance for his baggage, and when it was delivered certain articles were missing of the value of $89.29; and that when said telescope was delivered to the defendant at Edgerton it was properly and securely fastened and contained the missing articles.

So it appears from the established facts that the question for determination is whether or not plaintiff neglected to call for his baggage within a reasonable time after its arrival at Janesville and thus relieved the defendant from liability as a common carrier. The court below gave judgment for plaintiff on the theory that such liability continued. The appellant, on the other hand, insists that an unreasonable time elapsed from the time of arrival of the baggage until it was called for by plaintiff, and that after the deposit of the telescope in the defendant's baggage room its duty as common carrier ceased and it became liable as warehouseman only.

The appellant relies upon *Minor v. C. & N. W. R. Co.* 19 Wis. 40; *Hæger v. C., M. & St. P. R. Co.* 63 Wis. 100, 23 N. W. 435, and *Goldberg v. A. & W. R. Co.* 105 Wis. 1, 80 N. W. 920. These cases, we think, are not controlling. In *Minor v. C. & N. W. R. Co., supra,* the plaintiff carried her own baggage, and after arriving at her destination left the train with her baggage, which had been under her exclusive control since the time of taking passage, and placed such baggage with the baggage master at defendant's depot to be kept until sent for, and it was held that defendant was not liable as a common carrier, but only in case of gross negligence, the bailment being gratuitous. In *Hæger v. C., M. & St. P. R. Co., supra,* a traveling agent on Saturday afternoon engaged defendant to transport plaintiff's sample trunks as baggage from Red Wing to Hastings, Minnesota, and received the regular checks therefor, and took passage upon the same train upon which the trunks were carried. The trunks were placed in the baggage car and arrived at Hastings between 8 and 9 o'clock the evening of the day they were shipped, and

remained upon the platform a sufficient time for removal by plaintiff's agent who shipped them, and were thereafter placed in the baggage room and remained there until about 3 o'clock the following Monday morning, when the depot building, together with the trunks, were destroyed by fire not happening by negligence of defendant. The agent did not stop at Hastings and made no arrangement about the trunks, but went to Minneapolis, Minnesota, on the same train, and returned to Hastings between 1 and 2 p. m. Sunday following, went to the hotel, and did not call for the trunks until after the fire. Upon arrival of the trunks at Hastings there were conveyances ready to carry them to the hotel. In *Goldberg v. A. & W. R. Co., supra,* the baggage was delivered at the depot on the evening of January 27th about 5 p. m., the plaintiff intending to check it the following morning. During the night and before it was checked it was destroyed by fire without negligence on the part of defendant. So it will be seen that the foregoing Wisconsin cases are clearly distinguishable from the one before us. Several cases from other jurisdictions are cited and relied upon by counsel for appellant, but an examination of them discloses that they turn generally upon the question as to whether the time the baggage was allowed to remain before being called for was reasonable.

The court below found that the baggage was called for within a reasonable time, hence the defendant was liable. It is well settled that what constitutes a reasonable time depends upon the facts and circumstances of each particular case. *George F. Ditman B. & S. Co. v. K. & W. R. Co.* 91 Iowa, 416, 59 N. W. 257; *Chesapeake & O. R. Co. v. Beasley, C. & Co.* 104 Va. 788, 52 S. E. 566; *Matteson v. N. Y. C. & H. R. R. Co.* 76 N. Y. 381; *Dininny v. N. Y. & N. H. R. Co.* 49 N. Y. 546; *Jones v. Norwich & N. Y. T. Co.* 50 Barb. 193; *Wiegand v. Central R. Co.* 75 Fed. 370; *Powell v. Myers,* 26 Wend. 591. The facts in the case at bar dis-

tinguish it generally from those cited by appellant from other states as well as this state, and bring it in line with many cases holding that the time which elapsed after arrival and before being called for was reasonable. In the case before us upon the established facts we cannot say the finding that defendant's liability as common carrier was continued until the baggage was called for was wrong, and therefore the court below was not in error in holding the defendant liable. The following cases, among many others which might be cited, support the ruling of the court below: *Curtis v. A., G. & M. M. R. Co.* 49 Barb. 148; *Burgevin v. N. Y. C. & H. R. R. Co.* 69 Hun, 479, 23 N. Y. Supp. 415; *George F. Ditman B. & S. Co. v. K. & W. R. Co.* 91 Iowa, 416, 59 N. W. 257; *Powell v. Myers,* 26 Wend. 591.

We are constrained to the opinion that the judgment of the lower court was right and should be affirmed.

By the Court.—The judgment below is affirmed.

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Commencement: Service of summons. See CORPORATIONS, 17–19.

Discretionary orders: Dismissal of appeal.

Civil or criminal? See BASTARDY.

At law or in equity? See RAILROADS, 25.

Tort or contract? See CORPORATIONS, 16.

By a contract of agency for the sale of agricultural machinery no machinery was to be delivered to purchasers except for cash or notes actually received, and it was provided that any sale in violation of that requirement should be deemed a conversion of the machinery by the agents, who should thereupon become personally liable to the principal for the full price thereof. In an action by the principal against the agents the complaint set out the contract and alleged that in violation thereof the agents sold and delivered certain machinery without its being paid or settled for in cash or notes and that plaintiff elected to treat such delivery as a conversion of the machinery by the defendants, who were personally liable therefor. *Held*, that the action was one for breach of contract, and that the "conversion" mentioned in the contract and complaint meant merely that by default of the agents the property had become theirs and they had become personally liable as stipulated in the contract. *J. I. Case T. M. Co. v. Folger*, 468

Nature of action. See CIVIL RIGHTS, 1. CORPORATIONS, 5.

ADEQUATE REMEDY AT LAW. See RAILROADS, 25.

ADJOINING LANDOWNERS. See BOUNDARIES.

ADMISSIONS. See EVIDENCE, 3, 4.

ADVERSE POSSESSION.

The evidence in an action of ejectment is *held* insufficient to show plaintiff's continuous adverse possession of the land for twenty years. *Larzelere v. Wood*, 541

AFFIDAVIT for attachment: Amendment. See ATTACHMENT.

AGENCY. See PRINCIPAL AND AGENT.

AMBIGUITY in contract. See CONTRACTS, 1. VENDOR AND PURCHASER.

AMENDMENT of affidavit. See ATTACHMENT.

APPEAL AND ERROR.

Decisions reviewable: Appealable orders.

1. Under sec. 1379—17, Stats. (Supp. 1906; Laws of 1905, ch. 419, sec. 7), an order confirming the preliminary report of drainage commissioners is appealable. *In re Horicon D. Dist.* 227

Orders reviewable on appeal from judgment.

2. An appeal from a judgment does not bring up for review orders made after the judgment and after the term at which the verdict was rendered, denying leave to file exceptions to the charge and denying a motion to vacate the judgment and for a new trial. *Kozik v. Czapiewski,* 70
3. An order determining the provisions of the judgment on the subject of costs is an intermediate order necessarily affecting the judgment, is part of the record and must be included in the judgment roll, and so far as any error thereby committed appears of record may, under sec. 3070, Stats. (1898), be reviewed on appeal from the judgment, even though the order was not excepted to and there is no bill of exceptions. *Metzger v. Fowler S. & O. Co.* 131 Wis. 633, distinguished and limited. *Jones v. Broadway R. R. Co.* 595

Discretionary orders: Dismissal of appeal.

4. There having been no abuse of discretion in an order denying a motion to open a divorce judgment and set aside defendant's default, the appeal from such order is dismissed. *Lessig v. Lessig,* 403

By whom appeal may be taken: Waiver of right.

5. Where the court below granted a new trial unless defendant would stipulate to remit a part of the damages awarded by the jury on his counterclaim and allow a judgment for plaintiff for a certain sum, and defendant filed such a stipulation, he thereby waived his right to appeal from the judgment entered in accordance therewith. *Agnew v. Baldwin,* 263
6. The plaintiff in such case, however, who did not move for judgment on defendant's stipulation and did nothing to waive his claim to recover the entire amount for which he sued, did not lose his right to appeal. *Ibid.*

Exceptions. See APPEAL, 3.

7. An exception "to those portions of tne charge to the jury which are as follows," followed by portions of the charge covering separate propositions, many of which are unassailable, is an omnibus exception presenting no specific question for consideration. *Agnew v. Baldwin,* 263
8. An exception to a finding of fact "except quantity of logs driven and the ownership of the enumerated parts," does not authorize review of the part of the finding relating to the quantity of logs driven. *Phalen v. Hershey L. Co.* 571
9. Where, immediately after appellant's objection to a question had been sustained by the trial court, evidence of the same sort was admitted, but the bill of exceptions discloses no objection or

ruling of the court thereon, no error is shown. *Kozik v. Czapiewski,* 70

Motions for new trial: Review of evidence.

10. Where there was no motion to set aside the verdict the supreme court will not review the evidence to determine its sufficiency. *Maxon v. Gates,* 270

11. A motion for judgment notwithstanding the verdict does not challenge the sufficiency of the evidence to support the findings and cannot be treated as a motion to set aside the verdict on that ground. *Ibid.*

12. Error assigned on denial of a motion for new trial on the ground that the verdict was contrary to the evidence cannot be considered or the evidence reviewed on appeal where the bill of exceptions does not show that any such motion was made. *Cayouette v. Emil T. Raddant B. Co.* 634

Bill of exceptions. See APPEAL, 3, 9, 12.

Assignment of errors in briefs.

13. Rulings of the trial court as to the admission or exclusion of evidence should not be assigned as error unless they relate to something of a substantial nature and may probably have affected the result prejudicially to the party so assigning them. *Twentieth Century Co. v. Quilling,* 481

14. A mere explanatory sentence in the charge or in an instruction to the jury should not be separated from its context and error assigned; but the charge or instruction should be regarded as a whole and as the jury must have understood it. *Ibid.*

Review: Scope: Judgment in certiorari proceeding.

15. Where, upon appeal from a judgment quashing a writ of *certiorari,* the record shows that the circuit court heard the cause upon its merits on the return to the writ, and that there was no motion to quash, this court will review the judgment. *State ex rel. Gottschalk v. Miller,* 344

Same: Questions presented for review: Who may allege error.

16. In an action for breach of a contract it was stipulated that a special verdict be taken as to all issues except certain ones reserved for trial by the court. No objection was made to the form or sufficiency of the questions submitted, and in answer to one of them the jury found that the contract had not been, as alleged in the answer, abrogated on a certain day by mutual consent. There was no motion to set aside this answer, and no suggestion was then made that the issue as to abrogation had not been determined. Afterwards for more than two years proceedings were had at intervals for the purpose of ascertaining the amount of the damages. *Held,* that defendant's counsel had treated the question of abrogation of the contract as embraced in and determined by the special verdict or as settled by the undisputed evidence, and could not properly contend, on appeal, that the question was still open as to an abrogation subsequent to the day mentioned. *Maxon v. Gates,* 270

17. An order was made on defendant's motion, after the testimony had closed, reopening the case as to certain issues upon the express condition that the parties agree and stipulate that the findings of the jury then impaneled be taken by way of special verdict on all the other issues. No objection was made to the special verdict, which embraced the questions counsel then

thought material for determination; there was no motion to set aside; nor was the attention of the trial court at any time called to any supposed omission therefrom, although the trial was protracted for a long time thereafter. *Held*, that questions as to the form and sufficiency of the verdict were foreclosed. *Ibid.*

Same: Questions of fact: Findings, when disturbed.

18. Findings of fact by the trial court will not be disturbed unless contrary to a clear preponderance of the evidence. *Daubner v. McFarlin*, 515

19. Deference is due the judgment of the trial court on questions of fact, since it is in a better position to determine and better able to judge of the weight and credibility of the evidence than this court. *Larzelere v. Wood*, 541

20. A finding of fact by a referee upon conflicting evidence will not be disturbed on appeal unless it is clearly against the preponderance of the evidence. *Phalen v. Hershey L. Co.* 571

Same: Law of the case: Decision on former appeal. See APPEAL, 29, 30.

21. A decision on a prior appeal that the facts alleged in the answer, if established, would entitle defendant to judgment, is the law of the case upon a subsequent trial and appeal. *Twentieth Century Co. v. Quilling*, 481

22. *Affirmance on equal division of court.* See *Hagenah v. Milwaukee E. R. & L. Co.* 300

Affirmance and reversal: Material and immaterial errors. See CRIMINAL LAW, 3, 4. EVIDENCE, 8, 9. GIFTS, 3. HIGHWAYS, 7. HOMICIDE, 5. MARRIAGE AND DIVORCE, 7. MASTER AND SERVANT, 2, 20, 27, 34. MORTGAGES, 2. TRIAL, 1, 11, 12, 15.

23. Exclusion of a question asked on cross-examination merely by way of argumentative conclusion, from testimony previously given by the witness, as to her state of mind, with reference to which the jury could judge from such testimony, is *held* not a material error. *Kozik v. Czapiewski*, 70

24. Refusal to try a case without a jury in accordance with a stipulation under which a former trial was had was not harmful error where, after taking the verdict of a jury, the court made and filed full findings of fact in harmony with the verdict, thus adding its decision to that of the jury. *Twentieth Century Co. v. Quilling*, 481

25. An appellate court will not interfere with the action of a trial court in setting aside or disregarding a stipulation in respect to the conduct of a trial, in the absence of satisfactory affirmative proof that some right of appellant was prejudiced thereby. *Ibid.*

26. Where the principal has adopted and ratified an act of his agent, the exclusion of evidence as to limitations of the agent's authority to do such act is not prejudicial. *Ibid.*

27. Rejection of requested instructions, to the effect that the intent of one party in making a contract is immaterial without a similar intent on the part of the other, was not error, where the question of the special verdict covering that issue and the instructions given with respect thereto were such that the jury could not find thereon favorably to respondent without finding that there was a meeting of the minds of the parties as to the matter. *Ibid.*

Disposition of cause: When new trial ordered. See MASTER AND SERVANT, 16.

28. On reversal of a judgment in plaintiff's favor in an action for death caused by negligence, where the evidence, though tending to show defendant's negligence, was too vague and conjectural to justify a finding that such negligence proximately caused the death, but the court is not satisfied that all the available evidence on these questions was adduced on the trial, a new trial is ordered. *Reffke v. Patten Paper Co.* 535

Decision: Correction: Judgment construed.

29. The decision of a question by this court, even if erroneous, is not subject to correction after the term upon an appeal from the judgment of the trial court entered in accordance therewith. *Appleton W. W. Co. v. Appleton,* 395

30. This court having, upon a former appeal, directed judgment in plaintiff's favor "based upon and measured by the provisions and terms of" a certain contract, it is *held* that plaintiff's right to recover interest was not then determined, but must depend upon the terms of the contract and the acts of the parties with reference thereto. *Ibid.*

Costs: Printing. See COSTS.

APPEALABLE ORDERS. See APPEAL, 1–4.

APPEARANCE.

See ATTACHMENT, 2. COURTS, 1.

A defendant who applies for a change of venue thereby enters a general appearance in the action, even though in form he appears specially for that purpose. *State ex rel. Engle v. Hilgendorf,* 21

ARGUMENTS OF COUNSEL. See TRIAL, 1.

ASSESSMENT and collection of taxes. See TAXATION. TAX TITLES.

ASSESSORS. See TAXATION, 4–9.

ASSIGNMENT of notes. See BILLS AND NOTES. CORPORATIONS, 1.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 9, 12–16, 21, 26, 28. RAILROADS, 32, 37.

ATTACHMENT.

1. Under secs. 3701, 3702, Stats. (1898), relating to affidavits for attachment and amendment thereof, the jurisdiction of a justice of the peace to issue a warrant of attachment depends not upon the sufficiency of the preliminary affidavit, but upon the actual existence of the requisite facts, and these may be shown at any time before the trial, provided they existed at the time the original affidavit was first presented to the justice. *Givans v. Searle,* 608

2. Although the original affidavit for an attachment was insufficient, yet if, before the trial and while the justice had jurisdiction to entertain the cause and allow an amendment, the defendant appeared generally and went to trial without objecting to the attachment on the ground of insufficiency of the affidavit, this was a waiver of that objection and an admission of the existence of the facts upon which jurisdiction to issue the warrant rested, so that, without amendment of the original affidavit, the justice

continued to have jurisdiction not only to render a personal judgment against defendant but to entertain and determine the attachment proceedings. *Ibid.*

ATTORNEY GENERAL.

See CORPORATIONS, 9–12.

In respect to the commencement of actions there is a distinction between the power of the state and the power of the attorney general. The latter can bring and maintain an action *ex officio* and *sua sponte* only when and in the manner authorized by statute. *State v. Milwaukee E. R. & L. Co.* 179

ATTORNEYS AT LAW. See CHAMPERTY. TRIAL, 1.

AUTOMOBILES.

1. As to their reciprocal duties when approaching one another at the intersection of streets a bicyclist and an automobilist are governed by the common-law rule, each being bound to exercise reasonable care. *Weber v. Swallow,* 46
2. Findings of the jury that an automobilist in such a case was negligent are *held* to be sustained by the evidence. *Ibid.*
3. Plaintiff while riding a bicycle westward on the north side of a street collided at the intersection of a cross street with an automobile which had just crossed from the south side of the street, behind an eastbound street car, for the purpose of going north on the cross street. Upon the evidence it is *held* that plaintiff was guilty of contributory negligence either in failing to keep a proper lookout or in riding so near the street car and at such a speed as to render the collision inevitable. *Ibid.*

AUTREFOIS ACQUIT AND CONVICT. See CRIMINAL LAW, 1.

BAGGAGE: Liability of carrier. See RAILROADS, 28, 29.

BANKRUPTCY.

A finding of the trial court that at the time when certain payments were made by a corporation to defendant, within four months prior to the bankruptcy of the corporation, the defendant did not know or have good reason to believe that the corporation was insolvent, is *held* to be sustained by the evidence. *Ferguson v. Jansen,* 26

BASTARDY.

1. A bastardy proceeding, though purely statutory and strictly neither a criminal nor a civil action, has characteristics of both and is comprehended within the term "matters civil and criminal" as used in sec. 8, art. VII, Const., giving to the circuit courts original jurisdiction in all such matters not prohibited by law. *Goyke v. State,* 557
2. A bastardy proceeding is not a criminal action within the meaning of that term as used in ch. 24, Laws of 1895, creating the municipal court of the city of Oshkosh and county of Winnebago. *Ibid.*
3. Ch. 24, Laws of 1895, confers exclusive jurisdiction of bastardy proceedings upon the municipal court of the city of Oshkosh and county of Winnebago, and by implication prohibits the ex-

ercise of original jurisdiction in such matters by the circuit court for Winnebago county. *Ibid.*

BICYCLES. See AUTOMOBILES.

BILL OF EXCEPTIONS. See APPEAL, 3, 9, 12.

BILLS AND NOTES.

See CORPORATIONS, 1. EVIDENCE, 5, 6. SALES, 3.

Indorsement by the payee of his name on a nonnegotiable promise to pay, accompanied by delivery of the instrument, constitutes *prima facie* a valid transfer of the chose in action and the debt represented by it, and the purchaser may maintain action thereon. *Swedish Am. Nat. Bank v. Koebernick,* 473

BOARD OF REVIEW. See TAXATION, 7, 8.

BONDS. See SCHOOLS AND SCHOOL DISTRICTS, 3–5.

BOUNDARIES.

1. In controversies as to the location of corners or boundaries of lots or blocks in platted lands, the original location of monuments must prevail over the courses and distances marked on the plat. *Brew v. Nugent,* 336
2. If the monuments have disappeared their original location is to be determined by the best evidence available; and in such case location of the disputed points by means of measurements by courses and distances is evidentiary only, and its weight depends upon circumstances. *Ibid.*
3. Where the original markings of a block had been removed many years before the controversy as to the south boundary line of a lot arose, evidence of the construction of a fence designed to be on the north line of the lot so soon after the original survey as to render it probable that the monuments were then in place or their location readily ascertainable, and evidence of acquiescence in the location of such fence for some thirty or forty years, was competent and, with other evidence, was sufficient to warrant the conclusion that the fence was properly placed, notwithstanding evidence of a surveyor to the contrary based on measurements from supposedly original monuments in other blocks. *Ibid.*
4. Instructions to the jury in such case directing them to give primary and controlling evidentiary effect to the old fence line if they were satisfied that when built it accorded with the original survey, and calling the jury's attention to the undisputed facts and the testimony on the subject, are *held* not to have given undue significance to the old fence line. *Ibid.*

BRIEFS: Assignment of errors. See APPEAL, 13, 14.

BROKERS.

See VENDOR AND PURCHASER, 14.

A writing whereby in terms defendant gave plaintiffs the exclusive right to sell his land and agreed to pay them a commission in the event of a sale was signed by defendant but not by plaintiffs, and contained no stipulation requiring plaintiffs to do anything. Defendant afterwards sold the land without any as-

sistance from plaintiffs. *Held*, that plaintiffs could not recover a commission on such sale in the absence of a showing that they had accepted the implied obligations of the writing on their part by using ordinary diligence in endeavoring to make a sale. *Schoenmann v. Whitt*, 332

BUILDING AND LOAN ASSOCIATIONS.

Where a building and loan association has terminated the membership of a person in arrears, by declaring the shares forfeited, under sec. 2014, Stats. (1898), fines cannot thereafter be imposed for default in payment of instalments on his stock. These fines are imposed on the member in his capacity as such and are not authorized for default in the payment of interest on moneys borrowed by him in his capacity of a debtor or mortgagor. *Wis. Nat. L. & B. Asso. v. Pride*, 102

BUILDING CONTRACTS. See SCHOOLS AND SCHOOL DISTRICTS.

BURDEN OF PROOF. See CORPORATIONS, 1. EVIDENCE, 1. GIFTS, 2, 3. HIGHWAYS, 2. MASTER AND SERVANT, 3–8, 27, 28. SALES, 1. USURY, 1.

BURGLARY.

Burglary in the daytime being merely a lower grade of offense than burglary in the nighttime, it is not essential in a prosecution for the former offense to allege or prove that it was committed in the daytime. *Egan v. State*, 114

CARRIERS.
Liability for baggage. See RAILROADS, 28, 29.
Injury to passenger. See STREET RAILWAYS, 3.
Same: Fall of elevator in office building. See NEGLIGENCE, 2–5.

CAUSE OF ACTION: Nature, etc. See ACTION.

CERTIFICATE of convenience, etc., from Railroad Commission. See RAILROADS, 20–22.

CERTIORARI. See APPEAL, 15.

CHAMPERTY AND MAINTENANCE.

An agreement by the plaintiff in an action for personal injuries to pay his attorneys for their services a sum equal to one half of the recovery is not champertous where they do not agree to pay any of the costs. *Sparling v. U. S. Sugar Co.* 509

CHANGE OF VENUE. See APPEARANCE. VENUE.

CHATTEL MORTGAGES.

In sec. 2316*a*, Stats. (1898),—providing under penalty that no property taken by virtue of any chattel mortgage shall be sold or removed from the county, without consent of the mortgagor, within five days "from the time when the same was actually taken,"— the actual taking mentioned means a corporal taking out of the possession and control of the mortgagor; and a foreclosure sale, on notice, without any taking of the property is not a violation of the statute. *Minneapolis T. M. Co. v. Haug*, 350

CIRCUIT COURTS. See BASTARDY, 1, 3. COURTS. VENUE.

CITIES. See MUNICIPAL CORPORATIONS.

CITIZENS. See INDIANS.

CIVIL RIGHTS.

1. A complaint alleging that defendant's skating rink was a place of public accommodation or amusement; that plaintiff, after paying the price of admission, was prohibited by defendant from skating for the reason that he was a colored man; and that defendant thereby denied to plaintiff the equal enjoyment of the rink by an illegal discrimination based wholly upon color,—is *held* to state a cause of action under sec. 4398c, Stats. (1898). *Jones v. Broadway Roller Rink Co.* 595

2. A roller skating rink to which the public are invited upon no condition but the payment of a fixed charge is a "place of public accommodation or amusement," within the meaning of sec. 4398c, Stats. (1898), relating to denial of the equal enjoyment of the accommodations of "inns, restaurants, saloons, barber shops, eating houses, public conveyances, . . . or any other place of public accommodation or amusement." *Ibid.*

3. The provisions of sec. 4398c, Stats. (1898), relative to costs in actions brought thereunder, must prevail over the general statute (sec. 2918) enacted prior thereto. *Ibid.*

CLAIMS against city: Interest. See MUNICIPAL CORPORATIONS, 3–6.

CLERICAL ERRORS. See HIGHWAYS, 1. TAX TITLES, 1, 2. TRIAL, 19.

CO-EMPLOYEES. See MASTER AND SERVANT, 11.

COLORED PERSONS. See CIVIL RIGHTS.

COMITY. See CORPORATIONS, 14.

COMMERCE.

See CORPORATIONS, 15, 16, 18.

1. Regulation of the relation between master and servant as to acts done in interstate commerce, including restriction of the hours of labor, is within the power to regulate commerce among the several states, conferred upon Congress by sec. 8, art. I, Const. U. S. *State v. C., M. & St. P. R. Co.* 407

2. State legislation which directly and intentionally controls and regulates interstate commerce is prohibited; but an indirect or remote influence upon such commerce is not universally sufficient to invalidate an act of a state legislature within its police power. *Ibid.*

3. The right of the state, in the exercise of its police power, to protect its citizens generally from perils resulting from excessive hours of labor by railroad employees, is not impaired by the federal constitution except as such legislation shall interfere with or restrain interstate commerce in a respect in which Congress has to some extent acted upon the general subject. *Ibid.*

4. Regulation of the hours of labor of telegraph operators and train dispatchers on railroads in a state is within the power of the state, even though interstate commerce may be indirectly affected thereby, so long as Congress has not acted in the matter; but when Congress has enacted a law regulating or restricting the hours of service of operators engaged in interstate commerce, regulation of those hours either directly or indirectly is beyond the power of the state. *Ibid.*

5. The act of Congress of March 4, 1907, limiting, after March 4, 1908, the hours of service of operators and train dispatchers

employed by carriers in interstate commerce to nine hours in any twenty-four hour period in certain places and to thirteen hours in others, was a clear declaration that that particular subject should be under federal and not state regulation. *Ibid.*

6. Ch. 575, Laws of 1907 (sec. 1816*m*, Stats.), prohibiting after January 1, 1908, any corporation operating a line of railroad in whole or in part in this state from requiring or permitting any operator to remain on duty for more than one period of eight consecutive hours, is in conflict with and in negation of the act of Congress of March 4, 1907, and cannot be enforced as to operators engaged in the moving of interstate trains or traffic. *Ibid.*

7. Ch. 575, Laws of 1907 (sec. 1816*m*, Stats.), cannot be limited in its operation to employees engaged exclusively upon trains or business wholly within the state, and be sustained and enforced to that extent, because such a limitation is contrary to the express terms of the act; because it is not clear that the generality of the restriction was not an essential element of the entire legislative scheme; and because the impracticability of limiting hours devoted to domestic commerce alone is so obvious as to preclude belief in any such legislative intent. *Ibid.*

8. The act of Congress of March 4, 1907, being limited in its operation to carriers engaged in interstate commerce and to the conduct of their employees so engaged, to the exclusion of any who might be engaged purely in the domestic affairs of the employer, is valid. *Ibid.*

COMMISSIONS.
Of brokers, etc. See BROKERS. USURY.
Governmental: Delegation of powers to. See CONSTITUTIONAL LAW, 6–10.

COMMON CARRIERS. See NEGLIGENCE, 2–5. RAILROADS, 28, 29. STREET RAILWAYS, 3.

COMMON SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

CONDEMNATION OF LAND. See RAILROADS, 20–27. STREET RAILWAYS, 1, 2.

CONDITION PRECEDENT. See RAILROADS, 20.

CONFIDENTIAL COMMUNICATIONS. See HOMICIDE, 4, 5.

CONFLICT OF LAWS. See COMMERCE. CORPORATIONS, 14.

CONGRESS. See COMMERCE.

CONSIDERATION. See FRAUDS, STATUTE OF, 1.

CONSTITUTIONAL LAW.

Unconstitutional statute: Enjoining enforcement: Parties: Duty of courts. See CONSTITUTIONAL LAW, 16–19, 28.

1. A person specially injuriously affected by enforcement of an unconstitutional law may in judicial proceedings challenge the validity thereof. *Bonnett v. Vallier*, 193

2. An action against state officials to enjoin them from enforcing an unconstitutional legislative enactment is not an action against the state. In such circumstances the law, so called, affords such state officers no protection. They are judicially regarded as acting in their personal capacities only. *Ibid.*

3. An unconstitutional legislative enactment, though law in form, is in fact not law at all. "It confers no rights; it imposes no duties; it affords no protection; . . . it is in legal contemplation as inoperative as though it had never been passed." *Ibid.*

4. A court, upon its jurisdiction being properly invoked for the purpose, is in duty bound to test a legislative enactment by all constitutional limitations bearing thereon and condemn it if it be found illegitimate and thus uphold the constitution as superior to legislative will. *Ibid.*

5. In testing a legislative enactment as regards its constitutionality, all reasonable doubts must be resolved in favor of legislative power. *Ibid.*

Partial invalidity of statute: Effect. See COMMERCE, 7. CONSTITUTIONAL LAW, 14. STATUTES, 1.

Legislative power: Delegation: Ascertainment of facts. See RAILROADS, 3, 4, 7-9, 12.

6. Without any specific enabling provisions in the constitution the legislature of this state may make all laws necessary and proper for carrying into execution the powers which that instrument vests in the state government or in any department or officer thereof. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 146

7. In the usual process of enacting a law there is frequently necessary the preliminary determination of a fact or group of facts by the legislature. *Ibid.*

8. The legislature may delegate such power not legislative in its nature as it has itself authority to exercise. *Ibid.*

9. The legislature may create a *quasi*-judicial tribunal and delegate to that tribunal the power which the legislature possesses to ascertain, determine, and declare facts, whether such determination precedes or follows the enactment of the general legal rule. *Ibid.*

10. In a case in which its power of regulation cannot otherwise be justly or efficiently exercised the legislature has power to declare a general rule of law applicable to conditions of fact described by that law in general terms but not precisely ascertained, such law to take effect upon all specific cases within that general rule only when the existence of such conditions of fact is ascertained and established by subsequent determination of a judicial or *quasi*-judicial tribunal. *Ibid.*

11. Likewise a general rule of law may be enacted to take effect and be in force upon the subsequent establishment of certain facts or conditions; and the nature of the contingency in which the law is to go into effect is not material if such contingency be fairly connected with the object and purposes of the statute and reasonably certain. *Ibid.*

Same: Village boards: Regulation of saloons: Delegation of power.

12. The power to regulate saloons vested in village boards by subd. 26, sec. 893, Stats. (1898), is a legislative power, which cannot be delegated. *Little Chute v. Van Camp,* 526

13. A village ordinance requiring all saloons to be closed during certain hours "unless by special permission of the president," is void because it attempts to delegate legislative power to an executive officer and because it attempts to give him arbitrary

power, allowing him in the execution of the ordinance to discriminate among persons similarly situated. *Ibid.*

14. The clause giving the president such power being evidently a material inducement to the otherwise valid parts, the whole ordinance is void. *Ibid.*

Officers: Election or appointment. See TAXATION, 4.

Town and county government: Uniformity. See TAXATION, 6.

Taxation: Uniformity in rule. See TAXATION, 7.

Legislation affecting interstate commerce. See COMMERCE. CORPORATIONS, 15–19.

Navigable waters: Impairment. See DRAINS, 2–6. WATERS.

Police power: Scope: Reasonableness of regulations.

15. Legislative authority in the field of police power, the same as in any other, is fenced about on all sides by constitutional limitations. It cannot properly extend beyond such reasonable interferences as tend to preserve and promote the enjoyment, generally, of those "unalienable rights" with which all men are endowed and to secure which "governments are instituted among men." When it goes beyond that it enters the field of the destructive and so offends against some constitutional limitation. *Bonnett v. Vallier,* 193

16. What constitutes a proper subject for regulation under the police power is a judicial question. Matters of mere expediency in respect thereto are wholly for legislative cognizance. What is reasonable is primarily for legislative judgment, but in the ultimate it is a judicial question. There must be reasonable ground, having regard for the public welfare, for the interference, and the means adopted to accomplish the purpose in view must be reasonably necessary. *Ibid.*

17. What is reasonable in any given case being a matter resting in human judgment and difficult of ascertainment, in all doubtful cases judicial authority must defer to legislative wisdom, but where the interference is plainly excessive the duty of the court to repel the encroachment is absolute. *Ibid.*

18. What is reasonable is not necessarily what is best but what is fairly appropriate to the purpose, under all the circumstances. The scope of the term "reasonable" as regards any situation must be measured having regard to the fundamental principles of human liberty as understood at the time of the formation of the constitution, adapting the same to modern conditions. *Ibid.*

19. In determining what is reasonable the court must look to the language of the statute and the facts which appear because of judicial knowledge thereof or otherwise. *Ibid.*

Same: Public health: Tenement and lodging houses.

20. The construction and maintenance of tenement, lodging, and boarding houses is a proper subject for legislative regulation, but the degree of regulation permissible varies greatly according to circumstances. *Bonnett v. Vallier,* 193

21. A police regulation in the field mentioned in the last foregoing paragraph which is not excessive as to a large city might be held unreasonable if applied to the state at large. *Ibid.*

22. Limitations in the field suggested impossible or impracticable to comply with, either because of absence of facilities necessary therefor or expense so great as to render the regulation prohibitive in many situations, are unreasonable. *Ibid.*

23. A general police regulation down to minute particulars of the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith in the absence of any official approval of plans and specifications in advance, and containing no provision for such approval, is unreasonable. *Ibid.*

24. Where the penal feature of a police regulation is so severe, having regard to the nature of the regulation, as to efficiently intimidate property owners from using their property at all for tenements or lodging-house purposes and from resorting to the courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. It is a defiance of the equal protection of the laws rendering the act void irrespective of whether its provisions would otherwise be valid. *Ibid.*

25. A law regarding the construction of tenement houses requiring street courts to be six feet in width between the lot line and the opposite wall of the building—that is, under all conditions and in all localities to be at least six feet wide,—is an unreasonable interference. *Ibid.*

26. A police regulation making every habitation regardless of locality a boarding or lodging house in case the proprietor allows a person not a member of his family to have a sleeping room in the house, and regulates the maintenance of the house as regards light, location of beds, equipment with water-closets, etc., is an unreasonable interference. *Ibid.*

27. There is a wide interval between the ideal and the practical. The latter standard should prevail as to legislative regulations as to the construction and maintenance of tenement, lodging, and boarding houses. Common sense as to what is reasonable in such matters should prevail, not the extreme views of well-meaning persons, as to what is for the best. *Ibid.*

Same: Restricting hours of labor. See COMMERCE.

Supreme court: Superintending control of inferior courts. See COURTS, 3–15.

Circuit courts: Jurisdiction. See BASTARDY. VENUE, 2.

Faith and credit to be given to judgments, etc. See CORPORATIONS, 14. MARRIAGE AND DIVORCE, 4.

Equal protection of the laws.

28. To penalize good-faith resistance to the enforcement of a law by judicial interference is unreasonable and indefensible from any point of view. It denies the equal protection of the laws; it violates the constitutional guaranty to every person of a certain remedy in the law for all injuries to person and property, and violates every principle of civil liberty. *Bonnett v. Vallier*, 193

Due process of law. See TAXATION, 9.

Taking private property. See RAILROADS, 22–27.

CONTRACTS.

Requisites and validity. See APPEAL, 27. BILLS AND NOTES. BROKERS. EVIDENCE, 7. FRAUDS, STATUTE OF. JUDGMENT, 2. PRINCIPAL AND AGENT, 2. SCHOOLS, 1. SUNDAY. TRIAL, 11, 12. USURY. VENDOR AND PURCHASER, 3.

Evidence as to making. See EVIDENCE, 5–7. GIFTS. MASTER AND SERVANT, 1, 2.

Ratification of illegal contract. See PRINCIPAL AND AGENT, 2. USURY, 4.

Contract for benefit of third person. See SCHOOLS.

Place of contract. See CORPORATIONS, 17.

Construction and operation. See ACTION. BROKERS. INSURANCE. LOGS AND LUMBER, 1. PRINCIPAL AND SURETY. SALES, 1, 2, 4–6. SCHOOLS. VENDOR AND PURCHASER, 5.

1. Even an apparently unambiguous contract may be rendered ambiguous and open to construction if its words, taken literally, lead to absurdity or illegality when applied to the facts. *Clappenback v. N. Y. Life Ins. Co.* 626

Entire contract. See FRAUDS, STATUTE OF, 1, 3.

Indemnity or investment contract. See INSURANCE, 1.

Abrogation, rescission, etc. See APPEAL, 16. ELECTION OF REMEDIES. MUNICIPAL CORPORATIONS, 6. VENDOR AND PURCHASER, 14.

2. In an action upon a contract, abrogation thereof by mutual consent is new matter and, if relied upon as a defense, must be specially pleaded. *Maxon v. Gates,* 270

Performance or breach. See CORPORATIONS, 16. PRINCIPAL AND AGENT, 1. SALES, 3. VENDOR AND PURCHASER, 6, 7.

Reformation. See ELECTION OF REMEDIES.

Actions for breach. See ACTION. APPEAL, 16. VENDOR AND PURCHASER, 8–13.

Enforcement of contracts of foreign corporations. See CORPORATIONS, 17.

Enforcement by mandamus. See MANDAMUS.

Enforcing specific performance. See SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES. MASTER AND SERVANT, 9, 17, 19, 21, 23, 28, 31. NEGLIGENCE, 3. RAILROADS, 31–33, 35–37.

CONVERSION. See ACTION.

CONVEYANCES. See DOWER. EVIDENCE, 7. SPECIFIC PERFORMANCE. TAX TITLES. VENDOR AND PURCHASER.

CORPORATIONS.

Stockholders: Double liability: Foreign corporation: Enforcement in this state. See CORPORATIONS, 14.

Officers: Powers: Assignment of notes.

1. The authority of the secretary of a business corporation to assign notes given to the corporation will be presumed, in the absence of proof to the contrary and notice to the assignee. *Swedish American Nat. Bank v. Koebernick,* 473

Same: Removal. See CORPORATIONS, 9, 10.

Competency of officers and stockholders to testify as to transactions with persons since deceased. See WITNESSES, 3, 4.

Stock, when taxable. See TAXATION, 1–3.

Insolvency: Creditors' actions: Parties: Jurisdiction: Pleading.

2. It is not essential to the commencement of a creditor's action against a corporation that there be a receiver appointed. *Lehr v. Murphy,* 92

3. In case of the commencement of a creditor's action to conserve the property of a corporation for the benefit of creditors, if a creditor plaintiff is so circumstanced as to be competent to so invoke the court's jurisdiction other creditors not so circumstanced may be joined, and if a receiver appointed before the commencement of the action be also joined, whether the appointment be regular or not is immaterial, it being sufficient if there be one creditor plaintiff competent as aforesaid. *Ibid.*

4. The jurisdiction of the court to entertain a mere creditor's action against a corporation does not depend upon sec. 3216, Stats. (1898), and its associate sections. They are supplementary to, not in place of, the common law in regard to such matters. *Ibid.*

5. A mere creditor's action such as is above mentioned is not an action to wind up a corporation nor one to regulate its internal affairs. *Ibid.*

6. A complaint by a party competent to commence a creditor's action and containing a statement of the facts essential to such an action is good therefor as against a general demurrer, though parties be joined not necessary to such action and the complaint contains a statement of facts proper for a winding-up action and to vindicate rights not necessary to be determined in a creditor's action. *Ibid.*

Same: Preferences. See BANKRUPTCY.

Reclaiming misapplied assets: Removal of recreant officers: Action, by whom to be brought.

7. Sec. 3239, Stats. (1898), does not conflict with sec. 2605 (requiring every action to be prosecuted in the name of the real party in interest), but merely declares that the action for the relief mentioned shall be entertained by the court when brought by any plaintiff therein described if he is the real party in interest. *State v. Milwaukee E. R. & L. Co.* 179

8. The state is not "the real party in interest" so as to entitle it, or the attorney general in its name, under sec. 3239, Stats. (1898), to maintain an action to reclaim misapplied assets of a private corporation. The right of action in such case is primarily in the corporation itself and can be exercised only by it, except in those cases where a stockholder or a creditor may apply to a court of equity for protection, in the case of charitable or eleemosynary, and perhaps municipal, corporations, and possibly in a case where a corporation charged with a duty to the public might by dissipation of its assets or property disable itself from performing that public duty. *Ibid.*

9. The cause of action for the suspension or removal of recreant officers of a private business corporation is primarily in the corporation itself, and the state has no legal interest in the question such as would authorize it, under sec. 3239, Stats. (1898), to maintain an action for that purpose. *Ibid.*

[10. Whether it would be competent for the legislature to declare a public policy that the state, by reason of its interest in the taxability of the corporate assets or to regulate a corporation's charges with relation to its real investment or the like, should have a right to institute suit to enforce the primary right of the corporation to reclaim misapplied assets or remove unsuitable or misbehaving officers, is not determined.] *Ibid.*

Action to annul franchises or restrain their exercise.

11. There is no statute in this state authorizing the attorney general to institute an action to restrain a street railway company from exercising any rights under, and to set aside and annul, a franchise granted to it either by the state or through the medium of a city council. Such an action, if it can be maintained at all, must be brought by the state. *State v. Milwaukee E. R. & L. Co.* 179

[12. Whether an action in equity can be maintained, even by the state, to restrain the unlawful exercise of franchises ostensibly granted by a void ordinance, or whether the action must be in the nature of *quo warranto*, is not determined.] *Ibid.*

Foreign corporations: Creditor's action to conserve property in this state.

13. A creditor's action may be maintained in the courts of this state against a foreign corporation to conserve its property within the jurisdiction of such court for the payment of claims of creditors properly invoking such jurisdiction, as in case of a domestic corporation. *Lehr v. Murphy,* 92

Same: Action by foreign receiver to enforce stockholder's double liability: Comity.

14. The courts of this state will not entertain, on the ground of comity, an action by the receiver of an insolvent Minnesota corporation against a stockholder resident here to enforce collection of assessments levied by a Minnesota court (under ch. 272, Laws of Minn. 1899) on account of the double liability of stockholders under the constitution and laws of that state, contrary to the policy of this state. *Hunt v. Whewell,* 122 Wis. 33, followed. *Converse v. Hamilton,* 589

Same: License to do business in this state: Interstate commerce: Fraud: Pleading.

15. Sec. 1770*b*, Stats. (1898), requiring foreign corporations to obtain a license before transacting business or acquiring, holding, or disposing of property in this state, does not apply to such business as constitutes interstate commerce or to such property as is acquired, held, or disposed of in this state in carrying on interstate commerce; and from the provision declaring that contracts by an unlicensed foreign corporation shall be void on its behalf but enforceable against it there must be excepted such contracts as relate to interstate commerce. *Elwell v. Adder Machine Co.* 82

16. A complaint alleges that defendant, an unlicensed foreign corporation engaged in the business of selling adding machines, fraudulently induced plaintiff to enter into a contract to act as its selling agent for such machines in this state; that the fraud consisted in representing, by its conduct in making such contract, that it was a licensed corporation, and in concealing the fact that it was not licensed to do business in this state; that in execution of the contract, before discovering the facts, plaintiff had incurred certain expenses; and that upon such discovery he ceased to transact the business of the agency. *Held,* that if the contract set forth be construed to relate to interstate commerce and to be capable of being carried out by acts constituting such commerce, plaintiff shows himself in default and has no cause of action; while if the contract relates to intrastate commerce defendant would be unable to perform on its part until it should obtain a license to do business in this

state, and for failure of performance by defendant the plaintiff has a right of action on the contract, the existence of which right excludes any right of action for deceit or upon any *quasi*-contract liability. *Ibid.*

Same: Service of summons: Actions arising out of business transacted in this state.

17. An order for machinery from the defendant, an Iowa corporation, was made and accepted in Iowa, but the machinery was delivered to plaintiff, payment therefor made, the machinery tested, the contract rescinded an account of failure to comply with warranty, and the property returned to defendant's agents, all in Wisconsin. In an action to recover the price paid, *held* that, even if the contract was an Iowa contract, the cause of action arose out of business transacted in this state, within the meaning of subd. 13, sec. 2637, Stats. (1898), and hence that the summons was properly served upon the assistant secretary of state of Wisconsin, who, after the contract was made but before delivery of the machinery, had been duly appointed by defendant, pursuant to sec. 1770*b*, Stats. (1898), as its attorney for service of summons, etc., in such actions. *Paulus v. Hart-Parr Co.* 601

18. The statutes above mentioned do not relate merely to state business, but include and apply to business transactions within this state even when they grow out of contracts made in other states for shipment of property into this state, thus involving interstate commerce. *Ibid.*

19. The fact that defendant's license to do business in Wisconsin was revoked after the cause of action arose but prior to the service of the summons was immaterial, since under the statutes mentioned the right to serve upon the assistant secretary of state continued as long as any liability of the defendant remained outstanding in this state. *Ibid.*

CORROBORATION. See TRIAL, 5. WITNESSES, 7.

COSTS.

See APPEAL, 3. CIVIL RIGHTS, 3.

Costs are not allowed to respondent herein for printing of a supplemental case which was not necessary to a fair presentation of the merits of the appeal. *Hamann v. Milwaukee B. Co.* 39

COUNTIES.

1. The record of a meeting of a county board showing that ten members were present, that all of them except the chairman voted upon a resolution, five voting for and four against it, and that it was declared carried, is *held* to mean that it was declared carried by the chairman. *Strange v. Oconto Co.* 516

2. The chairman in such case will be presumed to have known the law (sec. 665, R. S. 1878) requiring all questions to be determined by a majority of the members present, and also to have understood his official duties. In declaring the resolution carried he must be held to have assented to and in legal effect voted for its passage; and the question was therefore duly determined in the manner required by the statute. *Ibid.*

COUNTY BOARD. See COUNTIES.

COURTS.

Jurisdiction: Lack: Waiver: When judgment void.

1. Where a court does not have jurisdiction of the subject matter of an action, mere submission thereto does not confer such jurisdiction, and if the court proceeds to trial and judgment the judgment is void. *Goyke v. State,* 557

Decision of preliminary jurisdictional question: Judicial action.

2. A court must always inquire whether the law either gives it the jurisdiction or imposes upon it the duty to entertain a given controversy, and must inquire into existence of facts, either of notice to one of the parties or of some other preliminary condition, upon which the law imposes on it the power and duty; and in deciding these questions the court acts judicially. *State ex rel. McGovern v. Williams,* 1

Duty as to unconstitutional statutes. See CONSTITUTIONAL LAW, 4, 5, 16–19.

Comity: Actions by foreign receivers, etc. See CORPORATIONS, 14.

Jurisdiction in creditors' actions against corporations. See CORPORATIONS, 4.

Reviewing orders of Railroad Commission. See RAILROADS, 2, 11–15, 18, 19.

Supreme court: Superintending control over inferior courts: Power, when and how exercised.

3. Where an inferior court decides a jurisdictional question or one preliminary to the main controversy submitted to it adversely to its jurisdiction and refuses further action, such decision, although judicial in character, constitutes, if erroneous, a refusal to perform its duty with respect to the main controversy; and in the absence of other adequate and sufficient remedy this court may, under the superintending control granted in sec. 3, art. VIII, Const., review such decision and consider whether or not it is the duty of the inferior court to entertain the controversy. *State ex rel. McGovern v. Williams,* 1

4. Performance of its duty by the inferior court in such a case may be compelled by *mandamus;* and the writ may be so framed as to compel, as ancillary to and in aid of the primary relief granted, the vacation of orders made by the inferior court which constitute formal obstacles to the performance of such duty. *Ibid.*

5. The decision of a trial court that the action of the grand jury in returning an indictment was void and that no valid indictment existed against defendant because a person not selected by the jury commissioners had served on such jury, is one preliminary to the main controversy and may be reviewed by this court under its constitutional superintending control of inferior courts. *Ibid.*

6. The power of this court to exercise its superintending control, under sec. 3, art. VII, Const., always exists when an inferior court either refuses to act within its jurisdiction or acts beyond its jurisdiction to the serious prejudice of the citizen and there is no other adequate remedy. *State ex rel. Umbreit v. Helms,* 432

7. The fact that it becomes necessary to review judicial action of an inferior court is not an insuperable obstacle to the exercise of the power of superintending control in a proper case. *Ibid.*

8. With respect to the superintending control of trial courts in criminal actions, any question arising by objection to the proceeding before the jury is impaneled and sworn is a preliminary question. *Ibid.*

9. Any erroneous disposition of a criminal case before a jury is impaneled and sworn by which the court below refuses to proceed further with the trial upon a valid complaint, indictment, or information, where it appears that the duty of that court was plain, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate, is sufficient to arouse the jurisdiction of this court under its power of superintending control. *Ibid.*

10. Thus, where the circuit court, before entering upon the trial, quashes a valid complaint, indictment, or information charging a criminal offense and discharges the accused, this court, in the absence of other adequate remedy, may, under its power of superintending control, by appropriate writ, require the inferior court to proceed within its jurisdiction and try the accused. *Ibid.*

11. The power of superintending control will not be exercised upon light occasion or when other and ordinary remedies are sufficient, but only when the exigency is of such an extreme nature as obviously to justify and demand the interposition of that extraordinary power. *Ibid.*

12. The quashing by the circuit court of a complaint charging a person with practicing medicine without having a license or certificate of registration as required by law, is *held* not to create an exigency calling for the exercise of this court's power of superintending control. *Ibid.*

13. *Per* MARSHALL, J.:

(1) The "general superintending control over all inferior courts," granted to the supreme court in sec. 3, art. VII, Const., is not limited other than by the necessities of justice. It extends to judicial as well as to jurisdictional errors.

(2) The necessities of justice, in a legal sense, do not reach beyond the scope of governmental policy as to righting wrongs by judicial interference; as for example, it stops in criminal cases at the constitutional prohibition of a second jeopardy.

(3) The grant of superintending control, though without specified means or instrumentalities for its exercise, includes by necessary implication all common-law writs and means applicable thereto and all power necessary to make such writs and means fully adaptable for the purpose.

(4) The extent of the power of superintending control, as to any particular group of circumstances, is not measurable by that of the common-law writ most adaptable in its ordinary scope to vitalize such power in regard to such circumstances. Such extent is referable to the necessities of the case, and the ordinary-use feature of the writ is to be expanded to meet the exigencies thereof.

(5) The common-law writs with the power indicated to adapt them leave no part of the court's superintending control power to be necessarily dormant for want of means to vitalize it.

(6) The existence of error in the field of the controlling power does not, necessarily, upon proper request in form, require the doors of the jurisdiction to open. When that should occur rests in sound judicial discretion.

(7) By the policy of this court its superintending control power is to be exercised only when the right of the matter involved is plain, there is no other efficient remedy for its invasion or denial, such invasion or denial is prejudicial, and, generally, and especially as to errors not strictly jurisdictional, the case presents circumstances of exceptional or extraordinary hardship. *State ex rel. Umbreit v. Helms,* 432

14. WINSLOW, C. J., assents to the holding that in a proper case this court will not only review by *mandamus* the action of an inferior court in dismissing a case upon a preliminary question without trial, but will review any ruling which results in the practical throwing of a case out of court before trial upon the evidence—this meaning, as applied to criminal cases, any ruling resulting in dismissal prior to the impaneling of a jury and the placing of the defendant in jeopardy. He also agrees with the conclusion that this case is not of sufficient importance to move this court to action. *State ex rel. Umbreit v. Helms,* 432

15. DODGE, J., concurring in the judgment, is of the opinion that the power of superintending control conferred on this court by the constitution is coterminous with the power vested in the court of King's Bench; that it extends to a review of decisions on preliminary questions needing to be decided before the trial court can take into consideration the merits of a controversy, but does not extend to a review of a decision that the facts stated in a criminal complaint constitute no offense—that not being the decision of a preliminary question but a decision of the merits upon an issue of law. *State ex rel. Umbreit v. Helms,* 432

Supreme court: Appellate jurisdiction, etc. See APPEAL AND ERROR.

Circuit courts: Jurisdiction. See BASTARDY. VENUE, 2.

Municipal courts. See BASTARDY, 2, 3. VENUE, 2.

Justices' courts. See ATTACHMENT. JUSTICES' COURTS.

CREDITORS' ACTIONS.

See CORPORATIONS, 2–6, 13.

1. Under the rule that some facts are pleadable according to their legal effect, it is proper in a complaint for a creditor's action, as regards the proper entry of the judgment at law on the moving creditor's claim and exhaustion of legal remedies for its collection, to allege, generally, that the judgment was duly rendered in a court having jurisdiction of the matter, specifying the same, and that execution was duly issued to enforce such judgment and that such execution was returned unsatisfied. In such case, under the liberal rules of pleading, the detailed facts sufficiently appear by reasonable inference. *Lehr v. Murphy,* 92

2. Circuit Court Rule XXVII, sec. 1, requiring in a creditor's action the pleading to state the amount actually and equitably due upon his judgment at law, is sufficiently complied with by the usual allegations that the action was not brought by collusion, etc.; that execution was duly issued to enforce the judgment and that the same was returned wholly unsatisfied. *Ibid.*

CRIMINAL LAW AND PRACTICE.

See BASTARDY. BURGLARY. GRAND JURY. HOMICIDE.

Former jeopardy: Reversal of conviction: Acquittal of lesser degrees of homicide.

1. On the first trial under an information charging murder in the first degree the court withdrew from the consideration of the jury all lesser degrees of homicide, holding that there was no evidence warranting the submission of any of them. Defendant was convicted, but on writ of error the judgment was reversed and it was held that the evidence did not warrant the conviction of murder in the first degree and that certain degrees of manslaughter should have been submitted to the jury. *Held*, that there had been no acquittal as to any of the degrees of homicide, nor had the accused been in jeopardy so as to preclude his conviction, on a second trial, of any degree of murder or manslaughter—all of which are included in the charge of murder in the first degree. *Montgomery v. State*, 119

Jurors: Waiver of objection to competency.

2. Where, in a criminal action, upon the examination of a juror as to his qualifications, it appeared that he was disqualified by reason of his inadequate knowledge of the English language, the defendant, by failing to challenge such juror for cause or otherwise object to his presence on the jury, waived all objections to his competency. *Okershauser v. State*, 111

Trial: Remarks by court: Prejudice: Curing error.

3. Upon a trial for murder a witness for the state was cross-examined as to his movements and the time of day when he saw the deceased two days before the homicide, and found difficulty in fixing any exact times. Upon objection to such cross-examination as irrelevant and immaterial the court said: "I don't know what it has to do with it, but I will state this for the benefit of the witness: When you cannot state positively the time, you may say it was somewhere between 1 o'clock and 5, or whatever time you may have in mind." Also, when the witness objected to stating how much money he had loaned to the deceased, the court said: "You may answer and let him know whether it was a large or small amount." Again, when asked whether he was a member of a certain labor union, the witness answered, "That is my business." Afterwards he stated that he was a member, and was then asked why he said it was none of counsel's business when asked if he was a member, and the court said: "He probably thought so." *Held*, that such remarks did not constitute prejudicial error. *Pollock v. State*, 136

4. On a murder trial there was a question as to whether a witness for the prosecution had been with the deceased during the afternoon preceding the homicide, and several witnesses for the defense had testified to having seen them together in a certain place at about 4 o'clock of that afternoon. Another witness then testified that he saw deceased at that time and place with a man whom he did not know and could not identify. The state moved to strike out this testimony, and the court said: "He didn't really give any." Afterwards the court told the jury that such remark was not well expressed and that he did not intend to intimate that the testimony was not credible or that it was not entitled to weight. *Held*, that this explanation removed any prejudicial error. *Ibid.*

Superintending control of supreme court in criminal cases. See COURTS, 5, 8–10, 12–15.

CROSS-EXAMINATION. See APPEAL, 23. HIGHWAYS, 8, 11.

CUSTOM AND USAGE. See MASTER AND SERVANT, 2, 20, 29, 32, 33. STREET RAILWAYS, 3.

CUTTING TIMBER. See TRESPASS.

DAMAGES.

See DEATH. TRESPASS. VENDOR AND PURCHASER, 8–13.

1. An award of $5,000 for injuries to a boy, whose leg was lacerated for a distance of fourteen to sixteen inches between the knee and hip and a portion of the muscle of his thigh torn out, and the use of whose leg was permanently impaired to a great degree, is *held* not excessive. *Hoffman v. Rib Lake L. Co.* 388

2. Whether the amount of damages found by the jury in this case was excessive is not determined; but MARSHALL, J., is of the opinion that, upon evidence substantially the same as that given upon the two trials already had, damages in excess of $8,000 could not be approved. *Ferguson v. Truax,* 637

DEATH.

See MASTER AND SERVANT, 16.

In an action by a widow suing as administratrix to recover for the death of her husband, evidence as to the health of the plaintiff and as to the number of her children was admissible, the jury being properly cautioned that she could recover only for the pecuniary damage resulting to herself from the death. *Hamann v. Milwaukee Bridge Co.* 39

DEBTOR AND CREDITOR. See ATTACHMENT. BANKRUPTCY. CHATTEL MORTGAGES. CORPORATIONS, 2–6, 13, 14. CREDITORS' ACTIONS. HOMESTEAD. MORTGAGES. MUNICIPAL CORPORATIONS, 3–6. PRINCIPAL AND SURETY. SCHOOLS.

DECEIT. See CORPORATIONS, 16.

DEEDS. See DOWER. SPECIFIC PERFORMANCE. TAX TITLES. VENDOR AND PURCHASER, 13.

DE FACTO OFFICERS. See OFFICERS.

DEFAULT: Judgment. See APPEAL, 4. JUDGMENT, 1.

DEFINITIONS. See WORDS AND PHRASES.

DEGREES OF CRIME. See BURGLARY. CRIMINAL LAW, 1.

DELAY. See EQUITY. RAILROADS, 28, 29.

DELEGATION of legislative power. See CONSTITUTIONAL LAW, 6–14.

DELIVERY. See BILLS AND NOTES. FRAUDS, STATUTE OF, 3. PRINCIPAL AND AGENT, 3. SALES, 1, 2. SUNDAY, 2. VENDOR AND PURCHASER, 3, 4.

DEMAND. See MUNICIPAL CORPORATIONS, 3–6. SALES, 3. SPECIFIC PERFORMANCE, 3.

DEMURRER. See CORPORATIONS, 6, 16. CREDITORS' ACTIONS. LANDLORD AND TENANT, 4–6. PLEADING. TAX TITLES, 3.

DEPOSITIONS.

See DISCOVERY.

Under sec. 4091, Stats. (1898), the objection that sufficient notice of the taking of a deposition was not given must be made before entering on the trial. *Cayouette v. Emil T. Raddant B. Co.* 634

DESCRIPTION.
Of proposed highway, etc. See HIGHWAYS, 1.
Of place of accident. See HIGHWAYS, 4.
Of defect in highway. See HIGHWAYS, 5, 6.

DISCOVERY.

Where it is apparent that there is no proper judicial proceeding in aid of which the court is entitled to the information to be obtained by an examination of parties under sec. 4096, Stats. (1898), such examination should not be allowed; and the court should dismiss the ostensible action when the futility of the attempt to institute it is made manifest. *State v. Milwaukee E. R. & L. Co.* 179

DISCRETION. See APPEAL, 4. COURTS, 11, 13. JUDGMENT, 1. MANDAMUS. MORTGAGES, 3. RAILROADS, 9, 19(3). WITNESSES, 5.

DISMISSAL of appeal. See APPEAL, 4.

DIVORCE. See APPEAL, 4. MARRIAGE AND DIVORCE.

DOWER.

Where a husband who had a mere contract for the purchase of land, upon which he had paid nothing, agreed to divide the land with a third person, the right of such third person to demand a deed of his part when the husband received title to the whole was prior and superior to any right of dower. *Inglis v. Fohey,* 28

DRAINS.

See APPEAL, 1.

1. Where proceedings to establish a drainage district had not been completed at the time of the enactment of ch. 419, Laws of 1905, it was proper, under sec. 35 of that act (sec. 1379—31*n*, Stats.: Supp. 1906), for the court to order that the further proceedings be had thereunder. Sec. 45 (sec. 1379—32*b*) is not applicable. *In re Horicon D. Dist.* 227

2. All waters declared navigable by act of the legislature must be regarded as navigable waters of the state and not subject to impairment under the drainage laws, at least in the absence of express legislative authority conferred upon the drainage commissioners in plain and unambiguous terms. *Ibid.*

3. The "riparian rights, rights of flowage, and water powers" which, under sec. 1379—28, Stats. (Supp. 1906; Laws of 1905, ch. 419, sec. 18), may be taken under drainage proceedings, have reference to private rights and do not include rights of the public in navigable streams. *Ibid.*

4. A pond or enlargement of a navigable river, created by a dam built across the river by authority of law, being at some seasons of the year several feet deep in places and capable of floating small craft and having existed in that condition for more than forty years, must be deemed a part of the navigable river, and drainage commissioners have no power, under existing laws at least, to destroy it. *Ibid.*

5. MARSHALL and SIEBECKER, JJ., concurring, are of the opinion that, the artificial condition of the pond having become, in a legal sense, a natural condition and the title to its bed having passed to the state in trust for public purposes incident to navigable waters at common law, nothing should be said which might be construed as suggesting the existence of any power in the legislature to authorize the destruction of such pond. *Ibid.*

6. BASHFORD and TIMLIN, JJ., dissenting, are of the opinion that neither the Rock river at the place in question nor the mill pond is navigable in fact, and that mere legal or artificial navigability is not sufficient to defeat the beneficent purposes of the drainage statutes. *Ibid.*

DUE PROCESS OF LAW. See TAXATION, 9.

EJECTMENT. See ADVERSE POSSESSION.

ELECTION as to paid-up insurance after default. See INSURANCE, 2.

ELECTION OF REMEDIES.

1. For two years after discovering the falsity of representations (as to value) by which they had been induced to make a contract for the purchase of land, the purchasers prosecuted an action for reformation of the contract upon grounds not connected with such fraud. *Held*, that they thereby ratified and elected to stand upon the contract actually made and, although judgment went against them in the reformation action, they cannot set up the fraud in avoidance of the contract. *Pfeiffer v. Marshall*, 51

2. So far as waiver of the fraud was concerned, it was wholly immaterial whether the contract was reformed or not, since the same fraud induced the making of the contract whether it was in fact as expressed in the writing or was as claimed by the purchasers. *Ibid.*

3. Taking any step to enforce a contract is a conclusive election not to rescind it on account of anything then known to the party so moving, and he will not be heard to say that he did not intend to waive. *Ibid.*

ELECTRIC RAILWAYS. See STREET RAILWAYS.

ELEVATORS: Fall: Injury to passenger. See NEGLIGENCE, 2–5.

EMERGENCY ASSESSMENT. See TAXATION, 4–9.

EMINENT DOMAIN. See RAILROADS, 20–27. STREET RAILWAYS, 1, 2.

EMPLOYER'S LIABILITY. See MASTER AND SERVANT, 3–34. RAILROADS, 31–38.

ENTIRE CONTRACT. See FRAUDS, STATUTE OF, 1, 3.

EQUITY.

See CORPORATIONS, 2-13. CREDITORS' ACTIONS. DISCOVERY. DOWER. ELECTION OF REMEDIES. HOMESTEAD. MARRIAGE AND DIVORCE. MORTGAGES. PRINCIPAL AND SURETY. RAILROADS, 24-26. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER, 5.

1. The defense of laches does not depend upon any statute of limitation, but is in the nature of an equitable estoppel barring the right to maintain an action by those who unduly slumber upon their rights. *Likens v. Likens*, 321

2. There is no fixed rule as to the lapse of time necessary to bar a suitor in equity. Great lapse of time, if reasonably excused and without damage to the defendant, has been ignored; while slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of defendant's position, has been held sufficient. *Ibid.*

3. After foreclosure of a mortgage given by the widow and heirs of an intestate, two of the heirs (defendants herein) bought the land for themselves from the purchaser at the foreclosure sale, and thereafter held it as their own, to the knowledge of all persons interested. After such purchase defendants mortgaged the land and appropriated to their own use the rents, issues, and profits thereof. A third heir, who knew of the purchase and that defendants claimed title adverse to him, acquiesced therein, and during the period of more than nine years until his death made no claim against them. After his death, and more than ten years after the purchase by defendants, the widow and heirs of said third heir brought this action to establish title to a share in the land and for an accounting, etc. During said ten years the land had increased in value four or five fold. No sufficient excuse for the delay was shown. *Held*, that the action was barred by laches. *Ibid.*

ESTIMATES. See MANDAMUS, 2-4.

ESTOPPEL. See EQUITY. LANDLORD AND TENANT, 1.

EVICTION. See LANDLORD AND TENANT, 2, 3.

EVIDENCE.

Competency, examination, and credibility of witnesses. See WITNESSES.

Taking testimony by deposition. See DEPOSITIONS.

Examination of parties before trial. See DISCOVERY.

Newly discovered evidence as ground of new trial. See NEW TRIAL.

Presumptions and burden of proof. See CORPORATIONS, 1. COUNTIES, 2. GIFTS, 2, 3. HIGHWAYS, 2. LANDLORD AND TENANT, 6. MASTER AND SERVANT, 3-8, 27, 28. SALES, 1. TAX TITLES, 3. USURY, 1.

1. In an action based on alleged negligence of defendant the burden of proof to satisfy the jury of the existence of such negligence is at all times upon the plaintiff, but when he has proven a situation which, unexplained, authorizes an inference or presumption of such negligence, and a specific defensive fact is testified to on behalf of defendant, the jury are not justified in finding the existence of that specific fact unless satisfied by a preponderance of the evidence. *Lipsky v. C. Reiss Coal Co.* 307

Relevancy, materiality, and competency. See DEATH. HIGHWAYS, 7, 9–11. HOMICIDE, 4–8. MASTER AND SERVANT, 2, 20, 29, 32–34. RAILROADS, 38. VENDOR AND PURCHASER, 7, 10. WITNESSES, 6.

2. Evidence of assays of ore, offered by plaintiff, was not competent to show that a roasting and separating plant complied with a warranty, where it was not shown that the ores assayed were from the mine in question, excepting one sample which was not of the kind and quality specified in the warranty. *Trego v. Roosevelt Mining Co.* 315

3. Evidence of what a deceased assured person said inconsistent with the answers contained in his application, which is not part of the *res gestæ*, is not competent against the beneficiary to prove the falsity of such answers. *Johnson v. Fraternal Reserve Asso.* 528

4. Statements made by an assured person inconsistent with the answers contained in his application, not a part of the *res gestæ*, are only provable to show knowledge on his part of the falsity of such answers when that is material and there is competent evidence warranting a finding that the answers were false. *Ibid.*

5. The question being whether the note in suit was given, as plaintiff claimed, for a county right to sell a patented article, or in pursuance of an illegal scheme of the parties to defraud other persons by selling to them nominal and practically worthless territorial rights to sell such article, evidence offered by defendant that there were at the time other devices similar to the one in question with which the latter would come in competition, so that purchasers of selling rights would not have the advantages of a monopoly, was admissible, whether such other devices were patented or not, as tending to show that such a contract as plaintiff claimed was made was unreasonable and the making thereof improbable. *Twentieth Century Co. v. Quilling,* 481

6. A failure to show what were the relative merits of such devices went to the weight of such evidence, not to its competency. *Ibid.*

Same: Confidential communications between husband and wife. See HOMICIDE, 4, 5.

Same: Experiments. See HOMICIDE, 8.

Admissions and declarations. See EVIDENCE, 3, 4. GIFTS, 1.

Parol evidence affecting writings.

7. The question being whether the parties made an oral agreement by which plaintiff was to convey to defendant certain lots and to fill them with earth so as to raise the surface one foot, and defendant was to pay therefor in lumber of a certain value and by assumption of a mortgage on the lots, the fact that a conveyance of the land and a written contract for delivery of the lumber were afterwards executed, neither of which purported to contain the entire contract, did not preclude the admission of parol evidence to show the other part of the agreement, relating to the filling of the lots. *Agnew v. Baldwin,* 263

8. Direct evidence of a party's intent in making a contract is admissible where such intent is material and is not manifest from the contract itself; and when the intent is so manifest the admission of direct evidence in harmony therewith is not prejudicial. *Twentieth Century Co. v. Quilling,* 481

Opinion evidence: Conclusions and opinions of witnesses.

9. In an action to recover a balance of the agreed price of a roasting and separating plant plaintiff should not have been permitted, as a witness in his own behalf, to answer a question as to whether the plant was completed so as to fulfil all the guaranties, since this called for his opinion upon an ultimate issue in the case which was contested and could only be resolved by the jury; and the error was prejudicial where, upon his cross-examination, plaintiff having shown himself incompetent by want of knowledge, the court refused to strike out the testimony, but later in the trial excluded like questions put to defendant's witnesses. *Trego v. Roosevelt Mining Co.* 315

10. Where a witness was permitted to testify fully as to what was said and done between a principal and his agent respecting a certain matter, it was not error to refuse to permit him to state his conclusion as to the limitation of the agent's authority in the matter. *Twentieth Century Co. v. Quilling,* 481

Same: Expert witnesses: Qualification, etc. See HOMICIDE, 8. WITNESSES, 8.

11. A witness who testified that he personally knew of several devices designed to accomplish the same result as the patented article in question, had observed them in use for quite a period of time, and had kept them for sale in his hardware business and sold them when traveling, was competent to testify as to the similarity of the other devices to the one in question. *Twentieth Century Co. v. Quilling,* 481

12. A witness who had had several years' experience as a wagon and carriage maker and in such business had seen five or six pole and thill coupling devices of the nature of the one in question and had observed some or all of them in use, was competent to testify as to the practicality of one of such devices and to testify as to what the devices shown him were designed for. *Ibid.*

Same: Hypothetical questions: Form.

13. Hypothetical questions to expert witnesses should be such that the jury can distinctly understand the exact facts upon which the witnesses base their opinions. That rule was violated in this case by questions to medical experts in which was assumed the truth of complicated, voluminous, and conflicting evidence. *Ferguson v. Truax,* 637

Weight and sufficiency of evidence. See ADVERSE POSSESSION. BOUNDARIES. HOMICIDE, 2, 3. MASTER AND SERVANT, 6, 7, 10, 17, 22, 29, 30. NEGLIGENCE, 5. VENDOR AND PURCHASER, 6. WILLS.

EXAMINATION.
Of party before trial. See DISCOVERY.
Of witnesses. See WITNESSES, 5.

EXCEPTIONS. See APPEAL, 3, 7–9.

EXCEPTIONS, BILL OF. See APPEAL, 3.

EXCESSIVE DAMAGES. See DAMAGES.

EXPERT TESTIMONY. See EVIDENCE, 11–13.

FALSE REPRESENTATIONS. See CORPORATIONS, 16.

FELLOW-SERVANTS. See MASTER AND SERVANT, 11.

FENCES. See BOUNDARIES, 3, 4.

FINDINGS OF FACT. See APPEAL, 18–20, 24. TRIAL, 18, 19.

FINES. See BUILDING AND LOAN ASSOCIATIONS.

FISH AND GAME. See INDIANS.

FORECLOSURE. See CHATTEL MORTGAGES. EQUITY, 3. HOMESTEAD. MORTGAGES.

FOREIGN CORPORATIONS See CORPORATIONS, 13–19.

FOREIGN RECEIVERS. See CORPORATIONS, 14.

FORMER JEOPARDY. See CRIMINAL LAW, 1.

FRANCHISES. See CORPORATIONS, 11, 12. STREET RAILWAYS, 1.

FRAUD. See BANKRUPTCY. CORPORATIONS, 16. EVIDENCE, 3–6. VENDOR AND PURCHASER, 14.

FRAUDS, STATUTE OF.

See JUDGMENT, 2. VENDOR AND PURCHASER, 3.

1. In an action in which supplementary proceedings were pending, a written stipulation for settlement provided in one paragraph that defendant should pay to plaintiff a certain sum in instalments at certain dates and that "in consideration thereof and in consideration of the *promises hereinafter noted by the other parties hereto*" plaintiff should accept such payments in full satisfaction of the judgment. This paragraph was signed by plaintiff and defendant. A second paragraph in the same document was signed by two other persons, who thereby guaranteed "full performance for said plaintiff by defendant *at the times aforesaid.*" *Held*, that there was but one contract or instrument and that the consideration for the guaranty was sufficiently expressed therein to satisfy the requirements of the statute of frauds, sec. 2307, Stats. (1898). *Scollard v. Bach*, 63

2. A finding by the jury that defendant agreed to repurchase mining stock sold by him to plaintiff within one year from the date of the sale, is *held* to be sustained by the evidence; and sec. 2307, Stats. (1898), is therefore inapplicable. *Vohland v. Gelhaar*, 75

3. Where, as a condition of the sale of mining stock, the vendor agreed that he would, at the vendee's request, repurchase it within a year at an advanced price, there was but one entire contract, and delivery of the stock and payment therefor by the vendee constituted such part performance as satisfied the statute of frauds—sec. 2308, Stats. (1898),—and entitled the vendee, upon due demand, to recover the advanced price. *Ibid.*

4. Where an oral agreement provided, among other things, that plaintiff should convey to defendant certain lots and should fill them with earth, the promise to fill the lots was a contract for services and not a sale of property; and when the parties put in writing those parts of the agreement which the statute of frauds required to be written the statute was satisfied and the entire contract became binding, unless the agreement to fill had been abrogated by consent of the parties before the writings were made. *Agnew v. Baldwin*, 263

5. Even if an oral contract under which defendant furnished saloon fixtures to plaintiff to be paid for in monthly instalments was void under the statute of frauds because not to be performed within one year, yet, after plaintiff had made payments thereon,

if defendant wrongfully took and converted the fixtures plaintiff could recover the amount paid. *Cayouette v. Emil T. Raddant B. Co.* 634

GAME. See INDIANS.

GENERAL APPEARANCE. See APPEARANCE. ATTACHMENT, 2, COURTS, 1.

GIFTS.

1. In an action upon an alleged express contract by defendant to repay the amount of a surgeon's bill paid by plaintiff for an operation on his daughter, defendant's wife, a declaration by plaintiff, in conversation with a third person about ten days before the payment was made, that he was to pay for the operation because defendant had had expense enough, was admissible to show that the money was paid by plaintiff as a gift. *Fallon v. Vandesand,* 246

2. The burden of proof was upon the plaintiff in such case with reference to the request for the loan and the promise of repayment. *Ibid.*

3. It was error in such case to instruct the jury that the burden was upon plaintiff to show that there had been no repayment, but there being no issue as to repayment raised by the pleadings or evidence, and no claim that the money had been repaid, the error was not prejudicial or material. *Ibid.*

GRAND JURY.

1. Upon the list of names from which grand jurors were to be drawn the jury commissioners placed the name of "George J. Davies, 663 38th Street." A venire was served upon John George Davies, who lived at that address, and he attended and served as a grand juror. Upon the evidence (summarized in the opinion) it is *held*, contrary to the decision of the trial court, that the man who so served, and not a George Jeremy Davies who lived on Cedar street, was the identical person whom the commissioners had selected, and that an indictment found by the grand jury was not void because of his participation in its action. *State ex rel. McGovern v. Williams,* 1

2. While jury commissioners have no official duty to state the place of residence of a person selected, the fact that they do state it is none the less significant of the identity of the person whom they had in mind in placing the name on the jury list, and is of so vastly greater weight than the mere transposition of an initial as to entirely outweigh it. *Ibid.*

GUARANTY. See FRAUDS, STATUTE OF, 1. PRINCIPAL AND SURETY.

HEALTH: Regulation of tenement and lodging houses. See CONSTITUTIONAL LAW, 20–27.

HIGHWAYS.

Proceedings to lay out or discontinue.

1. In the proceedings of a town board laying out a highway, designation of the point of beginning as eighteen rods west of the *northeast* corner of a certain quarter-section, instead of the *southeast* corner thereof, is *held* to be a mere clerical error not invalidating the order of the board, where other parts of the

description definitely showed the true point of beginning. *State ex rel. Gottschalk v. Miller,* 344

2. Under sec. 1298, Stats. (1898), an order laying out or discontinuing a highway is conclusive evidence, in the absence of an affirmative showing to the contrary, of the facts stated therein and of the regularity of the prior proceedings, including the sufficiency of a notice and its service upon the proper persons. *Ibid.*

Negligence in use. See AUTOMOBILES.

Injuries from defects: What constitutes insufficiency: Court and jury. See MUNICIPAL CORPORATIONS, 1, 2.

3. Whether alleged defects constituted an insufficiency or want of repair in a highway within the meaning of sec. 1339, Stats. (1898), is generally a question for the jury under proper restrictions, but may be one for the court if the conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy. *Kawiecka v. Superior,* 613

Same: Notice of injury: Evidence: Instructions to jury.

4. The notice of an injury caused by a defect in a highway described the place as about sixty rods north of a town line. There was evidence that the distance was about sixty-three rods, and evidence that it was about fifty-five rods. *Held,* that this warranted the jury in finding that the notice was substantially correct in that particular. *Redepenning v. Rock,* 372

5. Description of the insufficiency of the highway as consisting of "a large number of deep rut holes and a large number of roots and stones" was sufficient, where the evidence tended to show that at the place of accident the highway was gullied or washed out across the traveled track and that there was a rut or hole in this gully and a large stone near the edge of the track near the gully. *Ibid.*

6. Defects or inaccuracies in a notice of injury do not invalidate it, under sec. 1339, Stats. (Supp. 1906), if there was no intention to mislead and the town authorities were not in fact misled thereby but were actually informed of the place of injury and the nature of the defect complained of. *Ibid.*

7. In an action for an injury caused by a defect in a highway the admission, over defendant's objection, of evidence as to other defects and the general bad condition of other parts of the highway was not prejudicial error where such evidence was merely cumulative, several witnesses having already testified fully on that subject without objection from defendant. *Ibid.*

8. A supervisor of the defendant town having, in his direct examination, denied that he had any information of the defective condition of the highway, it was proper to require him to state, on cross-examination, whether he had not heard of previous accidents having occurred at the place in question. *Ibid.*

9. Evidence that, immediately after the accident to plaintiff, his father and another person pointed out to a supervisor of the town the place of the accident and the insufficiency of the highway, was admissible as showing that the town officers were informed as to such facts and were not misled, as claimed by defendant, by inaccuracies or indefiniteness in the written notice of injury. *Ibid.*

10. Although evidence that the road had been graded and repaired at the place of the accident soon after the accident occurred was not proper to prove that it was insufficient at the time of the accident, yet such evidence was admissible to refute defendant's claim that for a considerable time immediately preceding the accident the wet condition of the road had prevented repair thereof, and also to refute the claim that defendant was misled by defects in the notice of injury as to the place of the accident. *Ibid.*

11. Testimony of the superintendent of highways, to the effect that he was informed where the stake of plaintiff's woodrack broke and he fell from the wagon, was admissible to rebut the evidence of the other town officers that they were ignorant of the place of injury and were therefore misled by the defective notice, and also as tending to show that the superintendent was in fact informed of the place; and it was not error to refuse to permit him to be asked, on cross-examination, if he had not heard that the stake broke at a remote place from the place where the plaintiff claimed it broke, such inquiry not tending to impeach his testimony on the direct examination. *Ibid.*

12. An instruction to the jury to the effect that it was an undisputed fact that the stake on plaintiff's woodrack broke as his wagon struck the hole at the place of the accident is *held* justified by the evidence. *Ibid.*

HOMESTEAD.

1. The right to have a homestead exempt from liability for debts is to be preferred in equity to the rights of creditors. *Elsner v. Dorn,* 73

2. After defendant had established her homestead upon half of a lot owned by her, in a house built with money raised by a mortgage of the whole lot, contractors for the remodeling of a house on the other half lot obtained a mechanic's lien upon such other half and bought it in at the sale on foreclosure of their lien. *Held,* that upon foreclosure of the mortgage on the whole lot the half so acquired by the contractors, which was not the homestead, was properly ordered to be sold first. *Ibid.*

HOMICIDE.

Elements: Definition of terms.

1. Premeditated design and heat of passion are not necessarily inconsistent terms when used with reference to a homicide. *Montgomery v. State,* 119

Former jeopardy: Reversal of conviction: Acquittal of lesser degrees. See CRIMINAL LAW, 1.

Evidence.

2. The evidence in this case is *held* to sustain a conviction of manslaughter in the second degree. *Montgomery v. State,* 119

3. The evidence in this case is *held* to justify a finding that the killing was unnecessary and to sustain a conviction of manslaughter in the second degree under sec. 4351, Stats. (1898). *Pollock v. State,* 136

[4. Whether, upon the trial of a husband charged with premeditated murder of his wife, letters written by her to him shortly before

the homicide, when offered in evidence on his behalf to show the absence of ill-feeling between them, were properly excluded as being confidential communications, is not determined.] *Montgomery v. State,* 119

5. The state of feeling which such letters tended to prove being abundantly proven by parol testimony, and the jury having found that the killing was not premeditated but was done in the heat of passion, so that defendant was guilty of manslaughter in the second degree only, the error, if any, in the exclusion of the letters was not prejudicial. *Ibid.*

6. A letter written by the deceased to the defendant prior to their marriage three years before the homicide, was properly excluded as too remote. *Ibid.*

7. Where on a murder trial defendant claimed to have acted in self-defense, and there was testimony that a companion of the deceased, who was in the room at the time of a quarrel in which the latter was shot by defendant, picked up a cuspidor just before the shooting and that it was found to be broken after the affray was over, but there was no evidence that it was used as a weapon or as to how it was broken, rulings and remarks by the court as to the admission in evidence of the broken pieces of the cuspidor, to the effect that they might be received, together with certain broken chairs, and, if the jury found they were broken at the time in question, might be considered as tending to show the nature of the affray, are *held* not erroneous. *Pollock v. State.* 136

8. Where in such case defendant's testimony tended to show that when the fatal shot was fired he was struggling with the deceased and the muzzle of the pistol must have been within a few inches of the latter's vest, it was proper to permit the state in rebuttal, after testimony that there were no powder marks on the body of the deceased, to introduce evidence as to experiments, and testimony of experts, as to the distance at which a pistol would leave powder stains on the body. *Ibid.*

Remarks by court during trial: Curing error. See CRIMINAL LAW, 3, 4.

Instructions to jury.

9. After instructing the jury as to necessary elements of manslaughter in the second degree under sec. 4351, Stats. (1898),—*i. e.* the unnecessary killing of another while resisting an attempt of such other to commit a felony or other unlawful act,—the court further told them in effect that if the killing was with premeditated design it was murder in the first degree, not manslaughter in any degree, unless justified under the law of self-defense. *Held,* that this instruction was not capable of causing the jury to believe that defendant, though acting in self-defense, might still be guilty of manslaughter in the second degree. *Pollock v. State,* 136

HUSBAND AND WIFE. See DEATH. DOWER. HOMICIDE, 4–6.

HYPOTHETICAL QUESTIONS. See EVIDENCE, 13.

IMPEACHMENT of witness. See WITNESSES, 8.

INDEFINITENESS in contract. See SPECIFIC PERFORMANCE, 1. VENDOR AND PURCHASER, 5.

INDEMNITY CONTRACT. See INSURANCE, 1.

INDIANS.

1. Congress has power to abrogate the provisions of an Indian treaty. *State v. Morrin,* 552

2. The act of Congress admitting Wisconsin into the Union on an equal footing with the other states abrogated the stipulations of the treaty of March 28, 1843, with the Chippewa Indians respecting their right to hunt and fish within the borders of the state, so that they were thereafter subject to the laws of the state in that regard; and the treaty of September 30, 1854, giving to the Indians residing in the territory thereby ceded the right to hunt and fish therein, does not operate to exempt from the state laws an Indian who, under the act of Congress of February 8, 1887, has become a citizen of the United States and of this state. *Ibid.*

INDICTMENT AND INFORMATION. See BURGLARY. COURTS, 5, 9, 10, 12.

INDORSEMENT. See BILLS AND NOTES.

INITIALS. See NAMES.

INJUNCTION. See CORPORATIONS, 11, 12. RAILROADS, 24, 25. SPECIFIC PERFORMANCE, 5.

INSOLVENCY. See BANKRUPTCY. CORPORATIONS, 2–6, 13.

INSTRUCTIONS TO JURY. See APPEAL, 7, 14, 27. BOUNDARIES, 4. HOMICIDE, 9. MASTER AND SERVANT, 8, 27. NEGLIGENCE, 1, 2. TRIAL, 2–12.

INSURANCE.

Accident: Nature of contract: Investment or indemnity? Subrogation of insurer.

1. In the absence of any provision expressly making a policy of accident insurance an indemnity contract it is to be regarded as an investment contract in which the only parties concerned are the insurer and the insured or the beneficiary. Upon payment under such contract on account of an injury sustained by the insured the insurer does not become subrogated *pro tanto* to the right of the insured to recover from one who wrongfully caused the injury, and is not a necessary party to the action for such recovery. *Gatzweiler v. Milwaukee E. R. & L. Co.* 34

Life: Policy construed: Default: Election to take paid-up insurance for smaller amount, when effective.

2. Under the terms of a life insurance policy, and of an indorsement made thereon after default in payment of premiums, it is *held* that the insurance was to continue in force for the full amount for a period of six months after such default, and an election by the assured to take full-paid insurance for a smaller amount was not to become effective until the end of that period. MARSHALL, J., dissents from such construction of the policy, but concurs in the judgment on the ground that, as a result of the correspondence between assured and the company, any election to take paid-up insurance, other than one to take effect at the end of the six months, had been withdrawn by consent of the company. *Clappenback v. N. Y. Life Ins. Co.* 626

Same: Evidence: Statements of assured inconsistent with answers in application. See EVIDENCE, 3, 4.

INTENT. See APPEAL, 27. EVIDENCE, 8. HIGHWAYS, 6.

INTEREST.
On claims. See APPEAL, 30. MUNICIPAL CORPORATIONS, 3–6.
Usury. See USURY.
Of witness in result. See TRIAL, 4.

INTERSTATE COMMERCE. See COMMERCE. CORPORATIONS, 15, 16, 18.

INTERURBAN RAILWAYS. See STREET RAILWAYS, 1, 2.

INTOXICATION. See WITNESSES, 6.

INVESTMENT CONTRACT. See INSURANCE, 1.

JEOPARDY. See CRIMINAL LAW, 1.

JOINDER of parties. See INSURANCE, 1.

JUDGMENT.

Void for lack of jurisdiction. See COURTS, 1.

Statute, when a part of judgment. See MARRIAGE AND DIVORCE, 4, 8.

By default. See APPEAL, 4. MARRIAGE AND DIVORCE, 6, 7. MORTGAGES, 1.

1. In the absence of denial the allegations of the complaint stand confessed as against other than infant or nonresident defendants, although the trial court may, in its discretion, require proof thereof before rendering judgment. *Wis. Nat. L. & B. Asso. v. Pride,* 102

On trial of issues: Conformity to pleadings or proof. See SPECIFIC PERFORMANCE.

2. In an action to recover a share of the proceeds of a sale of land by defendant to a third person, on the ground that defendant had held the title as security for purchase money advanced by him for the use of plaintiff, it being found that defendant acquired the title to himself but orally agreed to sell to plaintiff, that plaintiff went into possession and made several payments, and that after the sale to the third person defendant repudiated such oral contract, it was not error to give judgment for plaintiff for the amount of the payments made by him under the oral agreement. *Richer v. Carlson,* 353

For deficiency on foreclosure. See MORTGAGES, 1, 2.

Modification. See MARRIAGE AND DIVORCE, 8.

Correction after term. See APPEAL, 29, 30.

Conclusiveness: Law of the case. See APPEAL, 21, 29, 30.

Full faith and credit. See MARRIAGE AND DIVORCE, 4.

JUDICIAL ACTION: Review under power of superintending control. See COURTS, 2, 3, 7.

JURISDICTION. See ATTACHMENT. CORPORATIONS, 4. COURTS. RAILROADS, 18, 19. VENUE, 2.

JURY. See CRIMINAL LAW, 2. GRAND JURY.

JURY COMMISSIONERS. See GRAND JURY.

JUSTICES' COURTS.

See ATTACHMENT.

Secs. 3619–3621, Stats. (1898), prescribing proceedings to be taken in an action in justice's court "where the title to lands shall in any wise come in question," are not limited to cases where

the title to land is directly in issue. They apply to an action to recover a share of the proceeds of a sale of land by defendant to a third person, where plaintiff claims that the sale was made under authority from him and on his account or on joint account, and defendant denies that plaintiff owns the land and claims that it belonged to himself and that the sale was made on his own account. *Richer v. Carlson*, 353

LACHES. See EQUITY.

LAND CONTRACT. See DOWER. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Estoppel to deny title: Husband and wife.

1. Where a married woman living with her husband in his house rented rooms therein and received the rentals as her own with his consent but not as his agent, one to whom she had so rented rooms could not, in an action by her for a balance of rent due, question her title to the premises. *Johnson v. Tucker*, 505

Constructive eviction: Special verdict.

2. Failure of a landlord for a considerable time to keep in repair the gas heater in a bath room is *held* not to have constituted, as matter of law, a constructive eviction of a lessee of rooms in the house. *Ibid.*

3. A question in a special verdict, "Was the defendant evicted from the leased premises?" is *held* to have been proper, the jury being duly instructed as to the law pertaining to constructive eviction. A suggested question, "Was the gas heater out of repair?" would have been immaterial, because relating to a merely evidentiary fact. *Ibid.*

Unlawful detainer: Pleading: Notice to quit: Service.

4. In an action for unlawful detainer, a complaint alleging that on or about October 1, 1905, defendant entered into possession of the premises as a tenant from month to month, and was to pay therefor a stipulated sum in advance on the first day of each and every month, and that on October 30, 1906, notice was served upon him to quit and deliver up possession of the premises on December 1, 1906, sufficiently shows that the tenancy began on the first day of the month and expired on the last day of the month. *State ex rel. Engle v. Hilgendorf*, 21

5. An allegation in such case that during the month of October, 1906, the plaintiff purchased the premises and that he *served* the notice to quit on October 30, 1906, sufficiently shows that he purchased prior to October 30 and *as landlord gave* the notice, as required by sec. 2183, Stats. (1898). *Ibid.*

6. An allegation that notice to quit was served upon defendant by delivering to and leaving with his wife, naming her, a written notice, notifying him to deliver up the possession and to remove from the premises, etc., and that defendant could not be found, sufficiently shows that the wife was a person of proper age and resided upon the premises, so as to make the service sufficient under sec. 2184, Stats. (1898). *Ibid.*

Injunction preserving status quo. See SPECIFIC PERFORMANCE, 5.

LAW OF THE CASE. See APPEAL, 21, 29, 30.

LEADING QUESTIONS. See WITNESSES, 5.

LEGISLATIVE POWER: Delegation. See CONSTITUTIONAL LAW, 6–14. RAILROADS, 3, 4, 7–9, 12.

LEX LOCI. See CORPORATIONS, 13, 17–19.

LICENSES.
To foreign corporations. See CORPORATIONS, 15–19.
To practice medicine. See COURTS, 12.

LIENS. See HOMESTEAD, 2. SCHOOLS, 2–4.

LIFE INSURANCE. See EVIDENCE, 3, 4. INSURANCE, 2.

LIMITATION OF ACTIONS. See EQUITY. TAX TITLES, 3.

LOCATION of railroad. See RAILROADS, 20.

LODGING HOUSES. See CONSTITUTIONAL LAW, 20–27.

LOGS AND LOGGING.

See TRESPASS. VENDOR AND PURCHASER, 1–4.

1. Plaintiff contracted to drive defendant's logs but became financially embarrassed and defendant took up the work and agreed to drive them at a reasonable price to be charged against plaintiff on the contract. During the drive defendant paid certain sums to riparian landowners who threatened to delay or prevent the drive unless damages for overflowing their lands were paid. The referee and trial court found that the danger of serious and prejudicial delay in the driving was apparently real and that the payments were necessarily made in order to enable the defendant to finish the drive within a reasonable time. There was evidence of an understanding between the parties that some such damages would probably have to be paid as a part of the expense of the drive. *Held* that, although there was no legal liability for such damages unless the drive was negligently made, reasonable payments of that nature were properly chargeable against plaintiff. *Phalen v. Hershey L. Co.* 571
2. In an action upon a logging contract the evidence is *held* to show that plaintiff left in the woods a greater quantity of logs than that found by the referee, and that the reasonable charges for cutting and banking uncut and skidded logs and the expense of driving the same were considerably less than the amounts found by the referee. *Ibid.*

MANDAMUS.

See COURTS, 4, 14.

1. *Mandamus* will not lie to compel performance of a duty unless it is a clear and absolute one imposed by law. *State ex rel. Fire & Rust Proof Const. Co. v. Icke,* 583
2. Sec. 925—94, Stats. (1898), provides, with reference to work done under contract with a city, that "the board of public works, or such officers as shall be designated to discharge its duties, may from time to time, at their discretion, grant to the contractor an estimate of the amount and proportionate value of the work done, which shall entitle him to receive the amount thereof, less twenty per cent.," etc. A contract with the city provided that in each month the city engineer should make such an estimate, and for payment to the contractor thereon. *Held*, that the statute is not a command to the city engineer, but to a board of which he is only one member, and that the duty imposed

thereby is a discretionary one. If, by virtue of the contract, an absolute duty rests upon the engineer to make such estimates, such duty is only a contractual one, and performance thereof will not be compelled by *mandamus*. *Ibid.*

3. SIEBECKER and TIMLIN, JJ., are of the opinion that, to prevent failure of justice, the writ of *mandamus* should issue to enforce contract obligations when that remedy is appropriate and there is no other adequate and efficient remedy; that in this case the duty of the engineer is one imposed by law, but that it is a discretionary duty and therefore *mandamus* will not lie to compel performance. *Ibid.*

4. BARNES, J., is of the opinion that if the duty of the engineer to make an estimate is clear his refusal to do so is necessarily arbitrary and the contractor has an adequate remedy at law; and for that reason *mandamus* will not lie. *Ibid.*

MANSLAUGHTER. See CRIMINAL LAW, 1. HOMICIDE.

MARKETABLE TITLE. See VENDOR AND PURCHASER, 13.

MARRIAGE AND DIVORCE.

1. A state has power to declare that marriages between its own citizens contrary to its established policy shall have no validity in its courts, even though they be celebrated in other states under whose laws they would ordinarily be valid; but the legislative intention that a statute should have such effect should be quite clear. *Lanham v. Lanham*, 360

2. Sec. 2320, Stats. (Supp. 1906; Laws of 1905, ch. 456)—providing that it shall be unlawful for any person divorced by any court of this state to marry again within one year, and that any such marriage shall be null and void—is a declaration of public policy and is clearly intended to control the conduct of residents of this state whether they be within or outside its boundaries. *Ibid.*

3. When persons domiciled in this state and subject to the provisions of said statute leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provisions of the statute and will not be recognized by the courts of this state. *Ibid.*

[4. Whether a judgment of divorce under the laws of this state should not be construed as containing an inhibition of marriage of either party within one year which must be given "full faith and credit" (under sec. 1, art. IV, Const. U. S.) in all other states, so that such a marriage is not valid anywhere, is not decided.] *Ibid.*

5. For the purpose of evading the statute above mentioned a divorced woman was married in Michigan to another resident of this state. They returned here and cohabited as husband and wife until the husband's death some months after the expiration of a year from the divorce. They had talked about a remarriage after the year, but it never took place on account of the husband's illness and death. *Held*, that there was no common-law marriage. *Ibid.*

6. In an action by the husband for divorce he had judgment by default. A division of his property was adjudged, although not asked for in the complaint. *Held*, that such division was not

"relief granted to the plaintiff" which, under sec. 2886, Stats. (1898), could not exceed that demanded in the complaint. *Hoh v. Hoh*, 84 Wis. 378, distinguished and questioned. *Lessig v. Lessig*, 403

7. Neither an award of alimony nor a division of property being demanded in the complaint, the adjudging of such division is not ground for reversal on an appeal by the wife, she not being aggrieved thereby. *Ibid.*

8. The provisions of secs. 2362, 2363, Stats. (1898), authorizing revision and alteration of a judgment of divorce in respect to the care, custody, maintenance, and education of the children, become in legal effect a part of the judgment; and although a judgment purports to "wholly" release the husband from the support and education of children it is nevertheless open for revision in that respect. *Ibid.*

MARRIED WOMEN. See DOWER.

MASTER AND SERVANT.

SERVICES AND COMPENSATION.

Share of profits: Evidence: Custom.

1. A finding by the jury that plaintiff's services in conducting defendant's store were rendered under an agreement that he should receive therefor a specified sum per month and in addition twenty-five per cent. of the profits of the business, is *held* to be sustained by the evidence. *Sicard v. Albenberg Co.* 622

2. The error, if any, in admitting evidence that it was customary or common to compensate managers of similar stores by allowing them a share of the profits in addition to a fixed salary, is *held* to have been cured by the court striking out all such testimony and directing the jury to disregard it as completely as if it had not been given. *Ibid.*

Regulation of hours of labor. See COMMERCE.

INJURIES TO SERVANTS: MASTER'S LIABILITY. See RAILROADS, 31–38.

Unsafe place to work: Fall of timber: Inference of negligence: Court and jury: Burden of proof.

3. From the mere fall of a timber constituting a part of a building or structure provided as a place in which employees are to work, arises a reasonable inference that the owner of the structure, the employer, has failed in his duty either to make it safe in original construction or to exercise reasonable diligence and care to keep it safe. *Lipsky v. C. Reiss Coal Co.* 307

4. In an action for injury to an employee caused by the fall of a timber constituting part of the superstructure of a coal dock, the question whether defendant had proved a reasonable possibility that the loosening of the timber was caused by the partial collapse, within a few days of the accident, as a result of rain, of a somewhat remote part of the dock, and had thus averted the inference of negligence from the accident itself, is *held* to have been one for the jury. *Ibid.*

5. The inference of negligence which in a proper case may be drawn from the accident itself is one of fact, and the authority of the jury to decide whether it should be drawn can be excluded only in presence of undisputed proof, not merely testimony, that such negligence did not occur. *Ibid.*

6. Proof of inspection of a structure may be evidence in disproof of negligence inferable from the happening of the accident, but is not necessarily conclusive disproof. *Ibid.*

7. Even though in such a case defendant has explained or accounted for the fall of the timber in such a way as to overcome the presumption of negligence arising from the accident itself, the fact that the timber fell and the necessary or natural inferences from that fact may still be considered by the jury, in connection with all other facts and evidence, in determining whether or not the fall was due to defendant's negligence. *Ibid.*

8. In an action for injury to an employee caused by the fall of timber constituting part of the superstructure of a coal dock, an instruction to the jury which is claimed to have put upon the defendant the burden of disproving negligence, but which the jury must have understood to mean merely that they would not be justified in finding that there had been complete and adequate inspection of the structure by defendant unless satisfied thereof by the greater weight of the evidence, is *held*, while unfortunate in its language, not to have been prejudicially erroneous. *Ibid.*

Same: Assumption of risk: Contributory negligence: Fellow-servants.

9. In an action for injuries to an employee in defendant's sugar factory who had been sent at night to repair a pump in the boiler room and fell into a trench recently dug in the floor and full of scalding water, it is *held* upon the evidence (tending to show, among other things, that he had no knowledge of the existence of the trench, that no barriers had been erected to prevent any one from falling into it, and that the boiler room was at the time full of steam, rendering vision difficult) that the questions of assumption of the risk and of contributory negligence were for the jury. *Sparling v. U. S. Sugar Co.* 509

10. The fact that plaintiff was helped out of the excavation nine or ten feet from the place where he claimed to have fallen into it, and that he gave no direct testimony as to how he reached that position, did not conclusively show the falsity of his story or render the manner in which the accident happened a matter of mere conjecture. *Ibid.*

11. The digging of the trench for the purpose of repairing a sewer under the floor of the boiler room being an unusual and extensive change in the room itself, not incidental in its character, but closely akin to the original preparation of a place to work, the skilled mechanic to whom such repairs had been committed was not a fellow-servant of the plaintiff, but was discharging the duty of the master to provide a safe place to work. *Ibid.*

Same: Assumption of risk: Duty of servant: Question for jury.

12. An employee who has as good an opportunity as his employer to know of defects or dangerous conditions attending his work assumes the risk thereof if he voluntarily and without protest continues in the employment. *Laughy v. Bird & Wells L. Co.* 301

13. But defects which are discoverable by the exercise of such care as is required of the employer are not necessarily discoverable by such attention to his surroundings as an employee is bound to give. *Ibid.*

14. The employee is only required to see and comprehend those defects or imperfections which would ordinarily attract the at-

tention of a person under the same or similar circumstances, in the exercise of ordinary care. *Ibid.*

15. Whether an employee in any particular instance is chargeable with knowledge of conditions imperiling his personal safety is generally, though not always, a question for the jury. *Ibid.*

Unsafe place or machine: Assumption of risk: Indefinite finding in verdict.

16. In an action for death of an employee in a mill a special verdict from which it cannot be determined whether the jury found that defendant was negligent in not furnishing a safe working place for deceased, in furnishing an unsafe machine at which to work, or in exposing him to unguarded and unfenced belting, gearing, shafting, etc., so located as to be dangerous to employees, all of which forms of negligence were charged in the complaint, is *held* so indefinite and defective as to necessitate a new trial, in view of the fact that the defense of assumption of the risk, available as to the other matters, was not, under sec. 1636*jj*, Stats. (Supp. 1906; Laws of 1905, ch. 303), available as to the unguarded gearing, and that the rights of the parties in that respect seem to have been overlooked at the trial. *Reffke v. Patten Paper Co.* 535

Unguarded gearing: Contributory negligence: Special verdict: Evidence.

17. In an action for injuries to a minor employee caused by his coming in contact with an exposed gearing in defendant's sawmill, the evidence is *held* to sustain findings in a special verdict that such gearing was so located as to be dangerous to employees in the discharge of their duties, that it was not securely guarded or fenced, that defendant was guilty of negligence in that respect, and that plaintiff was not guilty of contributory negligence. *Hoffman v. Rib Lake L. Co.* 388

[18. Whether sec. 1636*j*, Stats. (1898),—providing that gearings so situated "shall be securely guarded or fenced,"—imposes upon the employer an absolute duty to keep them so guarded, is not determined.] *Ibid.*

19. A question in the special verdict, "Did the plaintiff in any manner fail to use ordinary care which proximately caused or contributed to produce the accident?" which the jury answered "No," is *held*, in the light of the charge to the jury, to have been understood and answered by them as if it read, "Did the plaintiff in any manner fail to use ordinary care, which *failure* proximately caused or contributed to produce the accident?" *Ibid.*

20. Error in permitting a witness who had worked in five or six different sawmills to testify that gearings therein in situations similar to that of the gearing in question were covered was not prejudicial, defendant's duty to cover the gearing in question being imposed by statute. *Ibid.*

Same: Assumption of risk: Contributory negligence.

21. Although, in a case where an injury to an employee was caused by the negligent omission of his employer to guard or protect his machinery, sec. 1636*jj*, Stats. (Supp. 1906), abrogates the rule which bars recovery on the ground of assumption of the risk by continuance in the employment, it does not affect the employer's right to the defense of other phases of contributory negligence. *Klotz v. Power & M. M. Co.* 107

22. In an action for injuries to an employee caused by his arm being caught in the exposed gearing of a lathe at which he was working, the evidence is *held* to sustain findings by the jury to the effect that such gearing was dangerous to employees and that the injury was one reasonably to have been anticipated. *Ibid.*

23. Though the danger in such case was obvious and readily appreciated, the employee cannot be said, as matter of law, to have been guilty of contributory negligence merely because, while working at the lathe, his sleeve was caught by and his arm drawn into the exposed gearing. The inquiry is one of fact for the jury, as to whether, under the conditions, he used care reasonably commensurate with the risk. *Ibid.*

Unsafe apparatus: Duty to warn servant: Known danger.

24. The dumping apparatus in plain sight on the outside of a small car in which stone was pushed and pulled by workmen on a tramway in defendant's factory yard was not defective, so as to render defendant liable for an injury to one of the workmen, merely because it was so constructed that when the car was dumped a cross-arm at the end thereof descended so near to the planking of the tramway that a person's foot, if under it, would be injured, where in the ordinary and usual operation of the car the feet of the workmen would not be anywhere near the cross-arm. *Hanson v. Superior Mfg. Co.* 617

25. A workman whose foot was crushed between the cross-arm and the planking had worked twenty-three hours on the tramway with similar cars about a year before the injury and had then observed that the cross-arm descended so near the planking that if one's foot were caught between them there would be danger of serious injury. *Held*, that defendant was not negligent in failing to warn him of the danger when he again went to work on the tramway about three hours before the accident. *Ibid.*

26. The facts that the car causing the injury was a new one, the cross-arm of which descended somewhat lower than did those on the cars with which plaintiff had previously worked, and that he supposed that he was working with a car of the same pattern, were immaterial, since he was bound to anticipate the possibility of injury while working with the old cars. *Ibid.*

Instruction as to operation of machine: Assumption of risk: Contributory negligence: Burden of proof.

27. In an action for injuries sustained by a boy while operating a machine in defendant's factory, a charge to the jury which in effect put upon defendant the burden of proving affirmatively that proper instructions as to the adjustment and operation of the machine had been given to plaintiff, is *held* to have been prejudicially erroneous, notwithstanding a general statement in the opening part of the charge that the burden of proving his contentions was upon the plaintiff. *Blankavag v. Badger B. & L. Co.* 380

28. In an action for injuries sustained by a servant the burden of proof upon the issue of contributory negligence or assumption of risk is upon the defendant. *Ibid.*

Negligence in unloading heavy machine: Proximate cause: Evidence: Custom.

29. In an action to recover for death of an employee alleged to have been caused by negligence of defendant in the unloading of a

heavy machine from a car, evidence of the feasibility of using certain precautions and safeguards against the overturning of the machine which caused the injury, and that they were often applied by others, was sufficient to warrant a finding by the jury that the manner of unloading the machine was not reasonably safe. It was not necessary to show a general custom to use such precautions. *Hamann v. Milwaukee B. Co.* 39

30. The evidence in such case is *held* to warrant the inference of a causal relation between the perils set forth in the complaint (including narrowness and irregularity of the base of the machine) and the overturning of the machine which caused the injury. *Ibid.*

31. It was not necessary to a recovery in such case that the jury should find that defendant was negligent in adopting the method of unloading the machine or that its lack of reasonable safety was the proximate cause of the injury. The perils of the method adopted having been known to defendant's superintendent some considerable time before the machine overturned, and not obvious to the deceased, it became his duty to notify the deceased thereof; and findings that he failed to do so, that such failure was the proximate cause of the injury, and that the deceased was not guilty of contributory negligence, were sufficient to establish defendant's liability. *Ibid.*

[32. Whether in an action based on negligence in unloading a heavy machine from a car to the floor of defendant's factory the evidence as to a general custom to use certain precautions should be confined to what was done by manufacturers and dealers in and purchasers of machinery of that character, or might extend to the custom among movers of such machinery, not determined.] *Ibid.*

33. As preliminary to testifying to precautions which he had known to be used by others and to custom, a witness was permitted to testify to his experience in unloading a machine somewhat similar to the one in question. *Held*, not error, such testimony having a bearing upon the qualifications of the witness, and there being no request to limit its effect. *Ibid.*

34. It was not prejudicial error to permit a witness for plaintiff to testify that certain similar machines received at the same time as the one in question had been unloaded by defendant by means of a steam crane, and to state why the crane was not used for this machine,—the purpose of the evidence being apparently to show that the deceased had no knowledge of the dangers of the method adopted for unloading the machine in question. *Ibid.*

Damages. See DAMAGES, 1.

MAXIMS.
Consensus tollit errorem, 267.
Noscitur a sociis, 597.
Res adjudicata pro veritate accipitur, 125, 466.
Res ipsa loquitur, 311, 313.
Stare decisis, 591.

MEASURE OF DAMAGES. See VENDOR AND PURCHASER, 8.

MECHANICS' LIENS. See HOMESTEAD, 2. SCHOOLS, 2–4.

MEDICAL EXPERTS. See EVIDENCE, 13.

MEETINGS. See COUNTIES.

MINORS. See DAMAGES, 1. JUDGMENT, 1. MASTER AND SERVANT, 17. NEGLIGENCE, 4.

MISTAKE. See HIGHWAYS, 1. TRESPASS. TRIAL, 19. VENDOR AND PURCHASER.

MONEY PAID. See FRAUDS, STATUTE OF, 5. GIFTS. JUDGMENT, 2.

MORTGAGES.

See CHATTEL MORTGAGES. EQUITY, 3. HOMESTEAD.

1. In a judgment of foreclosure of a mortgage an order for the entry of a personal judgment for any deficiency is erroneous if there was no answer and no specific demand in the complaint for such deficiency judgment. *Wis. Nat. L. & B. Asso. v. Pride*, 102
2. The erroneous inclusion, in the foreclosure judgment, of an order for personal judgment for deficiency, is ground for appeal although it does not appear that there will be any deficiency. *Ibid.*
3. It was not an abuse of discretion to order, in a foreclosure judgment, that a receiver be appointed, on motion, if the premises should cease to be occupied as a homestead, where there was no denial of allegations in the complaint that the defendants had committed waste upon the premises by permitting them to be sold for taxes, that the premises are inadequate security for the mortgage debt, and that plaintiff fears further acts of waste, and where the mortgage expressly assigned the rents and profits to the mortgagee. *Ibid.*

MOTIONS for new trial. See APPEAL, 10–12.

MUNICIPAL CORPORATIONS.

Grant of franchise: Use of streets. See STREET RAILWAYS.

Granting of estimates on contract work: Discretion. See MANDAMUS, 2.

Defects in sidewalks: Liability for injury.

1. A city is not bound to keep its streets or sidewalks at all times in a condition of absolute safety, but only reasonably safe for travel. *Kawiecka v. Superior*, 613
2. The rebuilding of a portion of a sidewalk on a bridge by nailing planks to the upper side thereof, leaving the other portion unaltered, so that there was an abrupt change in level of two inches, is *held*, as matter of law, not to have created an insufficiency or want of repair in the walk such as would render the city liable to a person injured by tripping on the edge of the planking. *Ibid.*

Claims: When draw interest: Demand: Water furnished under contract.

3. Except as otherwise provided by statute, after a claim has been properly presented to a municipal corporation and payment duly demanded such claim will draw interest if interest would be allowable on a like claim against an individual. *Appleton W. W. Co. v. Appleton*, 395
4. Even where the time of payment for service rendered to a municipal corporation, as well as the amount, is definitely fixed by

contract, a demand for payment is necessary to create a default which will start the running of interest. *Ibid.*

5. Where a city charter provides that no action shall be maintained against the city upon any claim or demand until it shall first have been presented to the council for allowance, a claim for services rendered will not draw interest until so presented. *Ibid.*

6. A water company, which had been furnishing water to a city under a contract providing for certain rentals payable every six months, asserted that such contract was no longer in force and that it would thereafter furnish water at an increased rate and would exact monthly payments for the service. Afterwards, in an action to recover such increased rentals as upon an implied obligation of the city to pay what the service was worth, it was decided that the original contract was still in force, and plaintiff was permitted to recover in accordance with its terms. The city had at all times been ready and willing to pay on the basis of that contract. *Held*, that there had been no such demand as would start the running of interest upon the sum due on the contract. *Ibid.*

MUNICIPAL COURTS. See BASTARDY, 2, 3. VENUE, 2

MURDER. See CRIMINAL LAW, 1, 3, 4. HOMICIDE.

MUTUALITY. See BROKERS.

NAMES.

See GRAND JURY.

The use of a middle initial may under some circumstances be very significant in the identification of a person; but that significance varies much with circumstances, and the misplacement of an initial used by one whose current Christian name is also used is so probable and frequent an occurrence, at least among those whose acquaintance with him is not exact and intimate, that its significance is very much diminished. *State ex rel. McGovern v. Williams*, 1

NAVIGABLE WATERS. See DRAINS, 2–5. WATERS.

NEGLIGENCE.

See APPEAL, 28. AUTOMOBILES. DEATH. EVIDENCE, 1. HIGHWAYS, 3–12. MASTER AND SERVANT, 3–34. RAILROADS, 30–38. STREET RAILWAYS, 3.

Defining "ordinary care:" Instructions to jury.

1. Instructions to the jury defining ordinary care as "such care as a prudent man of the requisite skill will take under the circumstances of the particular case" and "such care as ordinarily prudent men exercise in matters affecting their own interests," are *held* erroneous. *Reffke v. Patten Paper Co.* 535

Elevator in office building: Injury to passenger.

2. The owner of an office building, maintaining therein a passenger elevator, is bound to exercise in keeping such elevator in a safe condition the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct of such business under the same or similar circumstances. An instruction stating the standard to be "such care as a *very*

prudent and skilful man would ordinarily use in a similar case," etc., is *held* erroneous. *Ferguson v. Truax*, 637

3. Whether in this case defendant had failed to use the required degree of care to keep the elevator in a safe condition, and whether a want of ordinary care on plaintiff's part contributed to produce his injuries, are *held* to have been questions for the jury. *Ibid.*

4. In an action for injuries sustained by a boy through the fall of a passenger elevator in an office building, the issue as to whether he was riding in the elevator for mere pastime or for the purpose of going to a doctor's office to ascertain if the doctor had work for him, is *held*, in the light of the facts and circumstances, to have been sufficiently submitted to the jury by the question in the special verdict, "Was the plaintiff at the time of the accident on his way to Dr. T.'s office to visit the doctor?" *Ibid.*

5. Although plaintiff's own testimony at the different trials and on a prior examination was contradictory and conflicting on the questions whether he was riding in the elevator for amusement or was on his way to a doctor's office and whether he had been forbidden by defendant's agent to ride in the elevator, yet since it was not obviously false in the light of reason and common knowledge or because contradicted by well known physical facts, its weight and credibility were to be determined by the jury in connection with the testimony of other witnesses. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL.

See APPEAL, 10–12, 28. MASTER AND SERVANT, 16.

A new trial asked on the ground of newly discovered evidence of two witnesses who were examined at the trial was properly denied where no sufficient reason was given why they were not then asked as to the alleged new fact, and where the suggested evidence would be merely cumulative. *Sparling v. U. S. Sugar Co.* 509

NOTICE.
Of lack of authority to assign notes. See CORPORATIONS, 1.
Of taking deposition. See DEPOSITIONS.
Of laying out highway, etc. See HIGHWAYS, 1, 2.
Of injury. See HIGHWAYS, 4–6, 9–11.
To quit. See LANDLORD AND TENANT, 5, 6.
Of tax. See TAXATION, 9.

OFFICERS.

Town officers acting in adjoining town. See TAXATION, 4–9.

Officers of an adjoining town who acted pursuant to sec. 1152, R. S. 1878, in the assessment and collection of taxes in a town in which the people had neglected or refused to elect town officers, were officers *de facto* for the purpose of exercising the authority conferred by said section, and it is not necessary to the validity of their acts that they should be classified as town, county, or state officers. *Strange v. Oconto Co.* 516

OFFICERS—continued.

Delegation of legislative power. See CONSTITUTIONAL LAW, 12–14.

Enjoining enforcement of invalid statute. See CONSTITUTIONAL LAW, 2.

Compelling performance of duty. See MANDAMUS.

Attorney general. See ATTORNEY GENERAL. CORPORATIONS, 9–12.

Jury commissioners. See GRAND JURY.

Of corporations. See CORPORATIONS, 1, 9, 10.

OPINION EVIDENCE. See EVIDENCE, 9–13.

ORAL AGREEMENTS. See APPEAL, 27. EVIDENCE, 7. FRAUDS, STATUTE OF, 2–5. GIFTS. JUDGMENT, 2. SALES, 5, 6. SUNDAY. TRIAL, 11, 12. VENDOR AND PURCHASER, 2–4.

ORDERS.
Review on appeal. See APPEAL, 1–4.
Laying out highways: Effect as evidence. See HIGHWAYS, 1, 2.

PARLIAMENTARY LAW. See COUNTIES.

PAROL EVIDENCE. See EVIDENCE, 7, 8.

PARTIES. See CONSTITUTIONAL LAW, 1, 2. CORPORATIONS, 3, 6–12. INSURANCE, 1.

PART PERFORMANCE. See FRAUDS, STATUTE OF, 3, 5.

PAYMENT. See BANKRUPTCY. FRAUDS, STATUTE OF, 5. GIFTS, 3. SUNDAY, 2.

PERFORMANCE of contract. See FRAUDS, STATUTE OF, 3, 5. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER, 5–7.

PERSONAL PROPERTY. See BILLS AND NOTES. CHATTEL MORTGAGES. SALES. TAXATION, 1–3. VENDOR AND PURCHASER, 1–4.

PHYSICIANS AND SURGEONS. See EVIDENCE, 13.

PLACE OF TRIAL. See VENUE.

PLEADING.

Liberal construction.
If the essential facts can be gathered from a pleading or may reasonably be inferred from its allegations, it is good, though such allegations be in form uncertain and incomplete. *State ex rel. Engle v. Hilgendorf,* 21

Complaints: Construction, sufficiency, etc. See CIVIL RIGHTS, 1. CORPORATIONS, 6, 16. CREDITORS' ACTIONS. LANDLORD AND TENANT, 4–6. TAX TITLES, 3.

Answers. See APPEAL, 21. CONTRACTS, 2.

POLICE POWER. See CONSTITUTIONAL LAW, 15–27. COMMERCE, 3, 4.

POSSESSION.
Of land. See ADVERSE POSSESSION. LANDLORD AND TENANT, 4–6. SPECIFIC PERFORMANCE, 5.
Of chattels. See VENDOR AND PURCHASER, 4.

PRESUMPTIONS. See CONSTITUTIONAL LAW, 5. CORPORATIONS, 1. COUNTIES, 2. EVIDENCE, 1. HIGHWAYS, 2. LANDLORD AND TENANT, 6. MASTER AND SERVANT, 3–7. TAX TITLES, 3. USURY, 1.

PRINCIPAL AND AGENT.

See ACTION. APPEAL, 26. BROKERS. CORPORATIONS, 16. EVIDENCE, 10. TRIAL, 10. USURY. VENDOR AND PURCHASER, 18.

1. By a contract of agency no machinery was to be delivered to purchasers except for cash or notes actually received, and any sale in violation of that requirement was to render the agents personally liable to the principal for the full price. *Held*, that acts of the agents in leaving machinery on the highway, not in charge of any person, and notifying the purchaser, without specifying any time, to come and get it and settle for it, thus giving him an opportunity, of which he availed himself, to get the machinery without first settling for it, were a breach of the contract, entitling the principal to hold them personally liable for the machinery. *J. I. Case T. M. Co. v. Folger*, 468
2. Where a principal, with full knowledge of all material facts, retains the fruits of an illegal contract made by an agent and attempts to enforce a note given as a part thereof, he thereby, as a matter of law, ratifies the act of the agent. *Twentieth Century Co. v. Quilling*, 481

PRINCIPAL AND SURETY.

See FRAUDS, STATUTE OF, 1. SCHOOLS, 3-5.

1. A surety has the right to determine and specify the exact conditions upon which he will be responsible for the debt of another, and an expression in the contract apparently declaring a condition of such liability will not be ignored unless the court can say with certainty that it is immaterial and that departure therefrom is without prejudice. *Chandler L. Co. v. Radke*, 495
2. One who guaranteed payment for lumber to be delivered "free on board cars" at its destination, with sixty days' credit, to a contractor almost wholly without means of his own, was discharged from liability by the vendor's requiring the vendee to pay the freight (amounting to seven per cent. of the price) before he could take the lumber, although such payment was credited on the purchase price. *Ibid.*

PRIVILEGED COMMUNICATIONS. See HOMICIDE, 4, 5.

PROCESS: Service. See CORPORATIONS, 17-19. LANDLORD AND TENANT, 6.

PROMISSORY NOTES. See BILLS AND NOTES.

PROOF OF SERVICE of notice. See LANDLORD AND TENANT, 6.

PROXIMATE CAUSE. See MASTER AND SERVANT, 30, 31. STREET RAILWAYS, 3.

PUBLIC HEALTH. See CONSTITUTIONAL LAW, 20-27.

PUBLIC POLICY. See CORPORATIONS, 10, 14. MARRIAGE AND DIVORCE, 2.

PUBLIC SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

QUO WARRANTO. See CORPORATIONS, 12.

RAILROAD COMMISSION. See RAILROADS, 1-22.

RAILROADS.

Regulation of rates, service, etc.: Powers of Railroad Commission: Judicial review of its orders: Reasonableness.

1. The Railroad Commission created by ch. 362, Laws of 1905, was intended by the legislature to be a tribunal of great dignity and responsibility having to deal with vast interests and complicated legal and economic questions, and was given powers appropriate to the discharge of these duties. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 146
2. Unless clearly required to do so the circuit court should not interfere with the determinations or orders of the Railroad Commission. *Ibid.*
3. If the orders and rules of the Railroad Commission were wholly legislative in their nature the legislature could not delegate to the Commission power to make such rules and orders. *Ibid.*
4. Neither could power be conferred upon courts by mere statute to review and set aside as unreasonable acts of the legislature not in conflict with the state or federal constitution or with some paramount federal law. *Ibid.*
5. It is impossible under our system of government to fix and maintain efficiently a system of just and reasonable regulation of railroad rates and service by direct action of the legislature specifying rates and details of service. *Ibid.*
6. The authority of the state to exercise the just and ordinary powers usually possessed by governments (among which is the regulation of rates and services of railroad carriers) is not to be restricted by mere implication from the expressed provisions of the state constitution. *Ibid.*
7. A statute declaring that railroad rates and service shall be reasonable, creating a commission with power to investigate existing rates and service and to fix and determine what rates and what service are reasonable, and providing that the rates and service so fixed shall be in force, is a valid exercise of the legislative power. *Ibid.*
8. The legislature may in such case, instead of making the law wholly conditional and contingent upon the ascertainment and declaration of reasonable rates or service by the commission, add the further contingency that the order of the commission fixing the rate or service be subject to review by the courts and upheld by the courts as not unreasonable. *Ibid.*
9. Neither the commission nor the courts can, however, be vested with discretion to determine whether the precedent law shall or shall not go into effect in particular cases. *Ibid.*
10. Ch. 362, Laws of 1905, assumes and declares the existence of a railroad rate, charge, classification, or service which is exactly reasonable and just, applicable to every special instance or condition, and discoverable by investigation, and commits to the Railroad Commission the duty to ascertain and disclose that rate, classification, or service, and when so ascertained and disclosed the mandate of the statute that rates, fares, charges, classifications, and joint rates fixed by the Commission shall be in force and *prima facie* reasonable, declares an ancillary rule of law to take effect in the particular instances investigated by the Commission, contingent upon the ascertainment and promulgation by the Commission of what is reasonable in

the particular instance or under the particular conditions under investigation. The Commission is not given power or discretion to fix one of several rates either of which would be just and reasonable, and hence there is no delegation of purely legislative power. *Ibid.*

11. The function of the courts, under said ch. 362, Laws of 1905, in reviewing an order of the Railroad Commission is not to determine whether the rate or service fixed by it is just and reasonable, but to determine whether the *order* is unreasonable or unlawful. If the order is found by the court to be such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable. *Ibid.*

12. In such review the courts are required to exercise no legislative power, to ascertain and disclose no rates, to declare no rule or law unreasonable, but merely to exercise judicial power in determining whether or not the order of the Commission was unreasonable and to set it aside if so found, leaving the Commission free to make further investigation and take further action; and the conferring of such authority upon the courts is within the legislative power. *Ibid.*

13. In the provision in sec. 16, ch. 362, Laws of 1905, that in an action to set aside an order of the Railroad Commission the burden of proof is upon the plaintiff to show by clear and satisfactory evidence that the order is unlawful or unreasonable, the words "clear and satisfactory" are intended to describe a degree of proof greater than a preponderance of evidence and such as is necessary to establish fraud or prove mistake in a written instrument. *Ibid.*

14. Considering the degree of proof required in such an action, the viewpoint of the investigation by the court, and that the court is dealing with a question of fact or a mixed question of fact and law, great weight will necessarily be given to the order of the Commission and a very strong case must be made to establish its unreasonableness. *Ibid.*

15. An order of the Commission need not be confiscatory in its character and effect in order to be unlawful or unreasonable within the meaning of the statute. *Ibid.*

16. What distinction there is between the terms "unreasonable" and "unlawful" as used in the statute, is not here determined. *Ibid.*

17. In this case an order of the Railroad Commission requiring the erection of a platform and the stopping of certain local passenger trains at a point about midway between stations 7.8 miles apart, is *held* not to have been shown to be unreasonable, although this court would not have made the order had it been sitting as a commission. *Ibid.*

18. MARSHALL and BASHFORD, JJ., concurring in the decision, are of the opinion:

(1) In every hearing before the Railroad Commission on complaint the initial and jurisdictional question is whether, in the given case, the conduct of the railroad company is unreasonable; and such jurisdictional fact should be shown affirmatively to have been found.

(2) The reasonable service or rate which the Commission is empowered to fix and order substituted for the service or rate complained of is in each case the minimum service or the maximum rate which is reasonable.

(3) A full judicial review of the action of the Commission is contemplated, the circuit court to try questions of law and fact the same as the Commission, giving such weight, however, to the decision of the latter on all matters of fact that it shall stand unless shown to be wrong by clear and satisfactory evidence; and, in case of an appeal to the supreme court, the scope of review to be the same as in case of any appeal from a judgment in an action tried by the court. *Ibid.*

19. DODGE, J., dissenting from the decision on the ground that the service in question, rendered by the railroad company at the time of the complaint to the Commission, was not shown to have been other than reasonably adequate, is of the opinion:

(1) The Commission is empowered first to determine whether a rate or service complained of is unreasonable, and not until or unless that fact is established is any further action by the Commission authorized.

(2) After finding that the rate or service complained of is unreasonable, it becomes the duty of the Commission to ascertain and declare *the* reasonable rate or service, which is the maximum rate or minimum service consistent with reason.

(3) The selection and fixing of any other than such maximum rate or minimum service would necessarily involve, not merely the ascertainment of a fact or condition, but also the exercise of choice or discretion based on considerations of policy or expediency. The power to exercise such choice is purely legislative and cannot be delegated.

(4) In reviewing an order of the Commission requiring certain service from a railroad company the court must assume that the Commission thereby fixed the minimum service which in its opinion would be reasonable, and if the court finds, after consideration of the evidence, giving due weight to the decision of the Commission, that a less service would be within the field of reason, the order should be held unlawful because an erroneous decision of a concrete question of fact. *Ibid.*

Regulation of hours of labor of employees. See COMMERCE.

Location of road: Extension: Right to condemn land: Certificate of convenience, etc.

20. The provision of sec. 1831, Stats. (1898), making it a condition precedent to the right to condemn land for a proposed extension of a railroad that the route of such extension shall be designated by resolution of the board of directors of the railroad company, is not abrogated by ch. 454, Laws of 1907, providing for the obtaining from the Railroad Commission of a certificate of convenience and necessity. *Eastern R. Co. of Minn. v. McCord,* 249

21. A certificate by the Railroad Commission to the effect that public convenience and necessity require the construction of a railroad between certain specified points and that the Commission has authorized its construction, and "that the portion thereof covered by this certificate is" a small part only of the line between the points named, is contradictory and void. No power is given to the Commission by sec. 1797—51, Stats. (Laws of 1907, ch. 454), or otherwise, to authorize the building of a part only of a railroad which it has certified to be required by public convenience and necessity. *Ibid.*

Taking of land: Compensation: Consent of owner: Injunction.

22. Neither ch. 454, Laws of 1907, nor a certificate of public convenience and necessity issued thereunder by the Railroad Commission, gives a railroad company the right to take property or to interfere with the rights of property owners without first making compensation. *McCord v. Eastern R. Co.* 254

23. The permanent appropriation of land for railway purposes is a taking within the meaning of sec. 13, art. I, Const.; and the legislature has no power to authorize such a taking of private property against the will of the owner without compensation first made or tendered. *Ibid.*

24. The entry by a railway company upon lands without the consent, tacit or express, of the owner and without compensation, with intention to appropriate them permanently, is unlawful and will be restrained. *Ibid.*

25. Equity will, in such a case, protect the owner in his right to the free and exclusive use of his property, the remedy at law being less adequate, comprehensive, and efficient to the ends of justice and its prompt administration. *Ibid.*

26. Upon the evidence in this case it is *held* that there had been no consent, express or tacit, by the owner to an entry by the defendant company upon his land. *Ibid.*

27. Sec. 1852, Stats. (1898), does not authorize a railroad company to take and hold possession of land without the consent of the owner and without first making or tendering compensation. *Ibid.*

Carriers: Liability for baggage, when ceases.

28. What constitutes a reasonable time for the removal of baggage, after which the carrier ceases to be liable as such for its loss, depends upon the facts and circumstances of each particular case. *Tallman v. C., M. & St. P. R. Co.* 648

29. In this case baggage which arrived at Janesville about 5 p. m. on Sunday and was called for about 8:30 or 9 o'clock on Monday morning is *held* to have been called for within a reasonable time, so that the carrier had not ceased to be liable as such for the loss of articles missing. *Ibid.*

Negligence: Injury to person walking beside track.

30. Plaintiff, while walking beside defendant's railway track, was struck on the head by a bucket attached to the side of a freight car in a passing train. The bucket, nine and one-half inches in diameter, did not project more than seven inches beyond the ladder on the side of the car and, being on an ordinary box car, did not project laterally beyond the track so much as some of the larger cars which are usually present in freight trains. It was a general custom on this and other railroads to carry a bucket in this way for use in treating hot boxes. *Held*, that the carrying of the bucket in such position did not constitute negligence. *Bandekow v. C., B. & Q. R. Co.* 341

Injuries to employees: Defects in track: Assumption of risk.

31. A railroad brakeman engaged in switching cars was not bound to search or look specially for defects in the track and roadbed likely to cause injury, in the absence of circumstances reasonably suggesting the existence of such defects. *Laughy v. Bird & Wells L. Co.* 301

32. In an action for injuries to a brakeman while making a flying switch, resulting from the derailment of an engine tender by reason of the defective condition of the track and roadbed at a curve, one of the defects being the insufficient elevation of the outer rail, it is *held* upon the evidence that the question as to assumption of the risk was one for the jury. *Ibid.*

33. Whether, in such a case, if the brakeman was not chargeable with knowledge of the dangerous condition of the track and roadbed, he was negligent in causing the flying switch to be made as it was, was also, upon the evidence, a question for the jury. *Ibid.*

Same: Structures near track: Rule of company: Disobedience: Contributory negligence.

34. A rule of a railway company forbade trainmen to work on the side of cars or trains where there were buildings or other projecting structures. It then instructed them: "Always work on that side where there are no buildings or structures, and in getting on or off or riding on the side of moving cars, do so only at places where there are no obstructions alongside the tracks, such as buildings, structures, lumber piles, etc., that will make such work hazardous." *Held* that, construing both parts of the rule together, it absolutely forbade trainmen to work or ride on the side of trains where there were any structures alongside the track, not merely when there were such structures as would "make such work hazardous" in the judgment of the particular employee who was doing the work. *Collins v. M. P. & N. R. Co.* 421

35. A trainman who knowingly disobeyed that rule and suffered injury by reason of that disobedience could not recover for such injury without showing that, in the due discharge of his duty, obedience was impracticable or that the rule had been waived or abrogated by habitual disobedience of the employees with knowledge and acquiescence of the company. *Ibid.*

36. The habitual violation which would serve to abrogate the rule must have been violation by the defendant company's own employees, not violation by employees of another company from which the defendant had adopted the rule. *Ibid.*

37. Where a trainman, while riding on the side of his train, was struck and injured by an ore bin near the track, the mere fact that he had frequently seen the bin and knew in a general way that it was located near the track was not sufficient to show, as matter of law, that he had assumed the risk, it appearing that he had never had occasion to examine its location closely or to take a car from it, and that it had been built only about two months, during about half of which time he was off duty. *Ibid.*

38. The admission of evidence that there was ample room on defendant's grounds, so that the ore bin could have been placed two or three feet farther from the rail, was not error. *Ibid.*

RATIFICATION. See APPEAL, 26. PRINCIPAL AND AGENT, 2. SUNDAY, 1. TRIAL, 10. USURY, 4.

REAL-ESTATE AGENTS. See BROKERS. VENDOR AND PURCHASER, 14.

REAL PARTY IN INTEREST. See CORPORATIONS, 7–10.

REAL PROPERTY. See ADVERSE POSSESSION. BOUNDARIES. BROKERS. CONSTITUTIONAL LAW, 20–27. DOWER. EQUITY, 3. EVIDENCE, 7. HIGHWAYS, 1, 2. HOMESTEAD. JUDGMENT, 2. JUSTICES' COURTS LANDLORD AND TENANT. MORTGAGES. RAILROADS, 20–27. SPECIFIC PERFORMANCE. STREET RAILWAYS, 1, 2. TAXATION, 9. TAX TITLES. TRESPASS. VENDOR AND PURCHASER.

REASONABLE TIME. See RAILROADS, 28, 29. SPECIFIC PERFORMANCE, 2.

REBUTTAL. See WITNESSES, 2.

RECEIVERS. See CORPORATIONS, 2, 3, 14. MORTGAGES, 3.

RECORD on appeal. See APPEAL, 3, 9, 12.

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REFORMATION OF INSTRUMENTS. See ELECTION OF REMEDIES.

RELEASE of surety. See PRINCIPAL AND SURETY,

REPLEVIN. See VENDOR AND PURCHASER, 4.

RESCISSION of contract. See VENDOR AND PURCHASER, 14.

RES GESTÆ. See EVIDENCE, 3, 4.

RES IPSA LOQUITUR. See MASTER AND SERVANT, 3.

RIPARIAN RIGHTS. See DRAINS, 2–5. LOGS AND LOGGING, 1.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 1, 2.

ROCK RIVER. See DRAINS, 6. WATERS, 2.

RULES.
Of railroad company: Construction: Violation. See RAILROADS, 34–36.
For construction of statutes. See STATUTES, 2–5.

RULES OF COURT.
Circuit Court Rule XXVII, sec. 1 (Creditors' actions), 93, 98.

SALES.

Requisites and validity. See FRAUDS, STATUTE OF, 2–5. SUNDAY.

Contract construed. See PRINCIPAL AND SURETY, 2.

1. Writings executed in August to the effect that plaintiff had sold to defendants his crop of tobacco for that year, consisting of a certain number of acres, to be delivered about the next January in certain prescribed forms and in good packing condition, are *held* to have constituted an executory contract, not a sale *in præsenti;* and in an action for breach thereof by refusal to accept the tobacco the burden of proof was upon the plaintiff to show substantial compliance on his part by offer of delivery of the tobacco in the forms and in the condition specified. *Grenawalt v. Roe,* 501
2. A contract to deliver lumber "free on board cars" at its destination means that it is to be delivered on board cars at that place, free to be taken by the purchaser without any obstruction, burden, or impediment; and it is not so delivered when, in order to take it into his possession, he must discharge a lien thereon for freight. *Chandler L. Co. v. Radke,* 495

Performance: Waiver.

3. Substitution of new notes for those originally given for machinery, under an agreement made at the time of returning a part of the machinery to the vendors, is *held* in this case to have been waived by the conduct of the makers, including their fail-

ure to demand return of the old notes or tender new ones and the subsequent making of several payments upon one of the old notes. *Swedish Am. Nat. Bank v. Koebernick,* 473

Warranties. See EVIDENCE, 2, 9.

4. In a contract for the erection of a roasting and separating plant for a mining company, a guaranty that the plant would "handle twenty-five tons of mill concentrates from said second parties' mill, providing the same do not carry more than thirty per cent. iron and four per cent. calcium carbonate, in each twenty-four hours of steady running, and that the finished product from the process will not contain more than four per cent. iron," was in substance a warranty that the plant would so operate as to handle the specified quantity of raw ore *in a reasonably proper manner* to accomplish the purpose of the roasting process; and if the plant was so defective in operation as to fail to handle the ore properly and as to waste it, the express warranty was not complied with. *Trego v. Roosevelt Mining Co.* 315

5. At the time of the sale of a carload of potatoes in sacks some of the sacks were opened and the potatoes found to be all right. The sacks could not all be opened and examined without the expenditure of much time. There was evidence that the vendors represented to the vendee that the rest of the potatoes were as good as those examined and that the vendee relied on such representation and paid for the potatoes, but upon promptly unloading the car found that about 100 bushels had been frozen, probably in transit. *Held* sufficient to warrant a finding by the jury that there was an express warranty and a breach thereof. *King v. Graef,* 548

6. In such a case, if there had been no express warranty, the vendee might recover for breach of an implied warranty of quality. *Ibid.*

Sales on foreclosure. See CHATTEL MORTGAGES.

SALES OF LAND. See BROKERS. DOWER. EVIDENCE, 7. HOMESTEAD. JUDGMENT, 2. JUSTICES' COURTS. SPECIFIC PERFORMANCE. TAX TITLES. VENDOR AND PURCHASER.

SALOONS: Regulation. See CONSTITUTIONAL LAW, 12–14.

SCHOOLS AND SCHOOL DISTRICTS.

1. A school district, as incident to the power to erect a school building and provide for payment therefor, has authority to contract for the protection of third persons who furnish to the principal contractor materials used in the construction of the building. *R. Connor Co. v. Ætna I. Co.* 13

2. No right to a lien upon property of a school district is given to laborers or materialmen. *Ibid.*

3. A contract with a school district for the erection of a school building provided, among other things, that the contractors should provide and furnish all materials at their expense, and that materials delivered on the premises should be considered the property of the district and might be used by it in case it assumed control of the work for the contractors. A bond given by the contractors to the district was conditioned that they

duly perform the contract "and pay for all labor and material that enter into the construction of the building." *Held*, that the bond was security for payment for material used in the building, upon the default of the contractor. *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, distinguished. *Ibid.*

4. The fact that, through a mistaken belief of the parties that the property was liable to liens for materials, the contract provided that payments to the contractors should be made upon proof that the property was free from such liens, did not render ineffectual the provision that the contractors should pay for all materials or show that the bond was not given to secure such payment. *Ibid.*

5. The bond being a contract for the benefit of the materialmen, it was not necessary that they should be ascertained or known at its inception to entitle them to its benefits. They might adopt it and enforce it at law as if originally made by their express authority. *Ibid.*

SELF-DEFENSE. See HOMICIDE, 7–9.

SERVICE.
Of summons. See CORPORATIONS, 17–19.
Of notices. See HIGHWAYS, 2. LANDLORD AND TENANT, 5, 6.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 1, 2.

SPECIAL VERDICT. See APPEAL, 16, 17. LANDLORD AND TENANT, 3. MASTER AND SERVANT, 16, 19. NEGLIGENCE, 4. TRIAL, 6–9, 13–17.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 5.

1. Indefiniteness in a written agreement in respect to the land intended to be covered by it is *held* in this case not to prevent the enforcement of specific performance, there having been a practical location of the premises by the acts of the parties, including the employment of a surveyor who, at the request of both parties, made a survey, set stakes, and made a plat, and delivery of the plat, with an order for abstracts, to the agent of the former owner from whom it was expected each party would receive title directly to his share of the land under their agreement. *Inglis v. Fohey*, 28

2. The fact that the time of performance is not fixed in a written agreement does not prevent the enforcement of specific performance, the legal implication being that it was to be performed within a reasonable time. *Ibid.*

3. Any defect in the tender of the purchase price or in the demand for a deed is immaterial where the vendor has utterly repudiated the contract to convey. *Ibid.*

4. Defendant, having a contract for the purchase of land, agreed to divide the land with plaintiff, and received $25 to secure the agreement, to be returned to the plaintiff when contract should be entered into with the original vendor; but defendant afterwards received title to the whole premises. *Held*, that the condition for the return of the $25 had ceased to exist, and upon compelling conveyance by defendant of plaintiff's share

of the land the $25 was properly treated as having been paid to defendant thereon. *Ibid.*

5. In the action to compel such conveyance, plaintiff being in possession, as tenant of the original vendor, of that part of the land which he asked to have conveyed, it was proper by injunctional order to restrain the defendant from interfering with such possession, plaintiff being also required to pay a monthly rental into court to abide the event of the action. *Ibid.*

STATE.
Admission to Union: Indian treaties, how far abrogated: Right to hunt and fish. See INDIANS.
Regulation of hours of railroad employees: Interstate commerce. See COMMERCE.
Legislative power: Delegation. See CONSTITUTIONAL LAW, 6–14.
Actions by and against. See CONSTITUTIONAL LAW, 2. CORPORATIONS, 8–12.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See EQUITY, 1. TAX TITLES, 3.

STATUTES.

Constitutionality. See COMMERCE. CONSTITUTIONAL LAW. RAILROADS, 3, 4, 7–9, 23. TAXATION, 4–9.

Partial invalidity: Effect. See COMMERCE, 7. CONSTITUTIONAL LAW, 14.

1. Where parts of a law viewed by themselves are unconstitutional and other parts so viewed are not, the former may be condemned and the latter upheld if the two are separable, otherwise not. In case the act as a whole has one or more invalid features pervading the entire act it must be regarded as an entirety and all be condemned as unconstitutional. *Bonnett v. Vallier,* 193

Construction. See APPEAL, 1–3. ATTACHMENT. BASTARDY. CHATTEL MORTGAGES. CIVIL RIGHTS. CORPORATIONS, 7–9, 11, 15, 17–19. DISCOVERY. DRAINS. FRAUDS, STATUTE OF. HIGHWAYS, 2, 3, 6. HOMICIDE, 1–3. JUSTICES' COURTS. LANDLORD AND TENANT, 5, 6. MANDAMUS, 2. MARRIAGE AND DIVORCE. MASTER AND SERVANT, 18, 21. MUNICIPAL CORPORATIONS, 2. OFFICERS. RAILROADS, 10–22. STREET RAILWAYS, 1. TAXATION. TRESPASS. VENUE, 2. WITNESSES, 1, 3, 4.

2. Rules for judicial construction of statutes are applicable only where there is uncertainty of sense. *State ex rel. Weller v. Hinkel,* 66

3. Penal statutes are to be strictly construed. *Minneapolis T. M. Co. v. Haug,* 350

4. In construing a statute the mischief intended to be prevented may be considered. *Ibid.*

5. Where statutes conflict in terms, ordinarily the later prevails over the earlier and the specific over the general. *Jones v. Broadway R. R. Co.* 595

Repeal. See RAILROADS, 20.

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3216	93, 99	4611	461
3236	191	4701	114

STIPULATIONS. See APPEAL, 5, 6, 24, 25. FRAUDS, STATUTE OF, 1.

STOCK AND STOCKHOLDERS. See CORPORATIONS. TAXATION, 1–3.

STREET RAILWAYS.

Condemnation of streets.

1. Under sec. 1863*a*, Stats. (Supp. 1906), giving to a street or electric railway corporation the right to condemn a street for the purposes of an interurban railway where *the use* of the street has first been granted to the company by a franchise duly passed by the city council, there can be no such condemnation where the only right which has been granted by the city council is a right to use the street for purely urban railway purposes. *Beloit, D. L. & J. R. Co. v. Macloon,* 218

2. If the proceedings in this case were brought to condemn the right to maintain an urban railway only on the street they were properly dismissed because no such condemnation is necessary. *Ibid.*

Franchises: Action to annul. See CORPORATIONS, 11, 12.

Negligence: Injury to passenger.

3. While on the rear platform of one of defendant's street cars and about to descend the steps, plaintiff was struck in the eye by the end of the rope attached to the trolley pole, which the conductor had thrown with one hand from the center window of the vestibule around to the side entrance thereof, intending to catch it with his other hand as it swung around. *Held* that,

notwithstanding any practice or custom in vogue among defendant's employees, the jury were warranted in finding that there was a negligent handling of the rope, that the plaintiff's injury was the natural and probable consequence of the negligent act, and that a person of ordinary care ought to have foreseen that some injury would be likely to result therefrom. *Coolidge v. La Crosse City R. Co.* 356

STREETS. See MUNICIPAL CORPORATIONS, 1, 2. STREET RAILWAYS, 1, 2.

SUBROGATION. See INSURANCE, 1.

SUMMONS: Service on foreign corporation. See CORPORATIONS, 17–19.

SUNDAY.

1. A contract of sale made on Sunday is void and is not susceptible of ratification. *King v. Graef,* 548

2. An oral agreement for the sale of a carload of potatoes was made on Sunday. On Monday they were delivered and paid for. *Held,* that such delivery and payment were not mere incidents of the Sunday transaction, but in themselves constituted a complete contract of sale and delivery. *Ibid.*

SUPERINTENDING CONTROL over inferior courts. See COURTS, 3–15.

SUPREME COURT. See APPEAL AND ERROR. COURTS, 3–15. RAILROADS, 11–15, 18, 19.

SURETYSHIP. See PRINCIPAL AND SURETY.

TAXATION.

Property taxable: Stock in corporations: Trust companies.

1. Corporate stock is "property" within the meaning of sec. 1034, Stats. (1898). *State ex rel. Weller v. Hinkel,* 66

2. Under subd. 9, sec. 1038, Stats. (1898), exempting from taxation "stock in any corporation . . . which is required to pay taxes upon its property in the same manner as individuals," the "manner" of taxation referred to is taxation upon an *ad valorem* basis. *Ibid.*

3. Prior to 1891 trust companies were required to pay taxes upon their property in the same manner as individuals, and stock therein was exempt. By ch. 263, Laws of 1891—sec. 1222*k*, Stats. (Supp. 1906; Laws of 1905, ch. 442)—they were required to pay annually a certain license fee and percentage of their net income "in lieu of all taxes" except taxes on their real estate. Under the new system the amounts payable were but a small proportion of those payable under the former law. *Held,* that the words "in lieu of all taxes," etc., indicate merely that the general property of such companies is exempt from ordinary taxation; that they are not required to pay taxes in the same manner as individuals; and therefore that stock in such companies is taxable. *Ibid.*

Failure to elect town officers: Assessment, etc., by officers of adjoining town. See OFFICERS.

4. Sec. 1152, Stats. (1898),—providing that whenever the property of a town shall fail to be assessed for taxation because of the neglect or refusal of the people to elect officers, the county board shall issue their warrant to the assessor and treasurer of a town next adjoining, requiring them to assess and collect the

taxes due from such town to the state and county till an election shall be held therein, etc.,—does not violate sec. 9, art. XIII, Const., in making such temporary provision for an emergency. *Strange v. Oconto Co.* 516

5. A town which neglects or refuses to elect town officers does not have town "authorities," and in such emergency, for the collection of the state and county tax, other residents of the county, holding office in an adjoining town, may lawfully be authorized to act, even assuming that town officers must be residents of the town in which they hold office. *Ibid.*

6. Sec. 1152, Stats. (1898), does not violate sec. 23, art. IV, Const., relating to uniformity in town and county government, since it provides a uniform rule for all towns in like condition. *Ibid.*

7. If said sec. 1152, when first enacted in 1850 (Laws of 1850, ch. 175), did not violate sec. 1, art. VIII, Const., requiring the rule of taxation to be uniform, it did not become invalid under that constitutional provision by the subsequent enactment of a statute making all other assessments subject to revision by a board of review, even if the emergency assessment provided for in sec. 1152 were not subject to such revision. If either statute were invalidated by such nonuniformity it would be the later one. *Ibid.*

8. The emergency assessment provided for in sec. 1152, Stats. (1898), is, like all other assessments, to be laid by the assessor before the board of review of his town for revision. *Ibid.*

9. The emergency assessment and collection of taxes under sec. 1152, Stats. (1898), do not deprive landowners of their property without due process of law in violation of the XIVth amendment, Const. of U. S., since they are given ample notice and ample opportunity to pay the tax. *Ibid.*

TAX TITLES.

Deeds: Validity: Errors in recitals.

1. A tax deed reciting that "J. L. Gates, and assignee of Ashland county, has deposited" certain tax certificates, etc., sufficiently shows that J. L. Gates, the applicant for the deed, presented himself as assignee of the county. The word "and" before "assignee" should be rejected as surplusage or as written by the clerk through mistake for "an." *Maxon v. Gates,* 270

2. A further recital in the deed that it appears from the certificates that the lands described were for nonpayment of taxes sold "at public auction, at Ashland, in the county of Ashland and J. L. Gates," on a day named, "to the said Ashland county for the sum," etc., shows that the lands were sold to the county. The words "and J. L. Gates," inserted after "the county of Ashland," describing the place of sale, cannot be transposed and inserted after "Ashland county" where it is named as the purchaser, and thus make it appear from the deed that there was a joint sale to the county and Gates, which would be unlawful. *Sprague v. Cœnen,* 30 Wis. 209, distinguished. *Ibid.*

Same: Limitation of actions.

3. Where, in an action commenced in 1908 to have tax deeds adjudged void, the complaint alleged that such deeds were issued and recorded in 1883 and 1885 respectively, it will be assumed, in the absence of averment to the contrary, that they were in

the form required by law; and, the lands being alleged to have been at all times vacant and unoccupied, the complaint shows on its face that the action is barred by the statute of limitations. *Strange v. Oconto Co.* 516

Tax title is "marketable title:" Deduction, by reason of. See VENDOR AND PURCHASER, 13.

TELEGRAPH OPERATORS on railroads: Restricting hours of labor. See COMMERCE.

TENDER. See SPECIFIC PERFORMANCE, 3.

TENEMENT AND LODGING HOUSES. See CONSTITUTIONAL LAW, 20–27.

TIME: Reasonable time. See RAILROADS, 28, 29. SPECIFIC PERFORMANCE, 2.

TITLE.

To land. See ADVERSE POSSESSION. DOWER. EQUITY, 3. JUDGMENT, 2. JUSTICES' COURTS. LANDLORD AND TENANT, 1. TAX TITLES. VENDOR AND PURCHASER, 13.

To personalty. See BILLS AND NOTES. VENDOR AND PURCHASER, 1–4.

TORTS. See ACTION. APPEAL, 28. AUTOMOBILES. CORPORATIONS, 16. DAMAGES. DEATH. ELECTION OF REMEDIES. EVIDENCE, 1. HIGHWAYS, 3–12. MASTER AND SERVANT, 3–34. NEGLIGENCE. RAILROADS, 30–38. STREET RAILWAYS, 3. TRESPASS. VENDOR AND PURCHASER, 4.

TOWN SUPERVISORS. See HIGHWAYS, 1, 2, 8, 9, 11.

TOWNS. See HIGHWAYS. OFFICERS. TAXATION, 4–9.

TRAIN DISPATCHERS: Restricting hours of labor. See COMMERCE.

TRANSACTIONS with persons since deceased. See WITNESSES, 1–4.

TREATIES. See INDIANS.

TRESPASS.

In an action for trespass by cutting timber it is *held*, upon the evidence, that there was no support for a finding by the jury that the cutting of timber on plaintiff's land was done by mistake; that such finding should have been changed by the court; and that plaintiff was entitled to recover under sec. 4269, Stats. (1898), the highest market value of the timber, in whatever place or condition, while in defendants' possession. *McNaughton v. Borth,* 543

TRIAL.

Place of trial. See VENUE.

Stipulation as to conduct of trial: Disregarding. See APPEAL, 24, 25.

Improper remarks by court during trial. See CRIMINAL LAW, 3, 4. HOMICIDE, 7.

Reception of evidence: Order of proof, etc. See WITNESSES, 2.

Arguments and conduct of counsel.

1. Remarks by plaintiff's counsel to the jury as to a witness for defendant having been induced by money to testify falsely, and as to other matters, are *held* unwarranted by the evidence and prejudicial as tending to inflame the minds of the jury. *Ferguson v. Truax,* 637

Questions for court or jury. See HIGHWAYS, 3. MASTER AND SERVANT, 4, 5, 9, 15, 23. MUNICIPAL CORPORATIONS, 2. NEGLIGENCE, 3, 5. PRINCIPAL AND AGENT, 2. RAILROADS, 32, 33, 37. WAIVER, 2.

Instructions to jury. See APPEAL, 7, 14, 27. BOUNDARIES, 4. HOMICIDE, 9. MASTER AND SERVANT, 8, 27. NEGLIGENCE, 1, 2.

2. Refusal to give instructions as to the weight of certain isolated evidentiary facts or circumstances was not error. *Hamann v. Milwaukee Bridge Co.* 39

3. Refusal to give requested instructions which are adequately covered by the general charge is not error. *Ibid.*

4. Where a decision in a party's favor depends largely upon the weight to be given his own testimony, the court should, upon request, instruct the jury that in considering the weight to be given his testimony they should consider his interest and the motive which he has to testify favorably to himself. *Blankavag v. Badger B. & L. Co.* 380

5. A requested instruction that, if the jury found that any witness had wilfully testified falsely as to any material fact, they might disregard all his testimony except as it might be "corroborated by other evidence in the case" was defective because of the omission of the word "credible" before the word "evidence." *Ibid.*

6. Although a requested instruction is a fair statement of the law on the subject, if it is a general instruction, not applying to any question of the special verdict, the refusal to give it is not error. *Ibid.*

7. Where a special verdict is to be taken, the refusal of instructions suitable only to a case submitted for a general verdict is not error. *Collins v. M. P. & N. R. Co.* 421

8. Same point. *Twentieth Century Co. v. Quilling,* 481

9. The rule that, in charging the jury with respect to a special verdict, the court should not inform them as to the effect of their answers does not preclude the court from instructing the jury that if they answer a certain question in one way they need not answer a subsidiary question, where the jury must unavoidably see, without that instruction, that such answer to the primary question would necessarily terminate the controversy. *Sicard v. Albenberg Co.* 622

10. Requested instructions on the subject of the ratification of an agent's act were properly refused where the evidence showed ratification as a matter of law. *Ibid.*

11. In an action upon an alleged contract an instruction to the effect that no form of words is necessary to constitute a contract, and that if the natural inference from what appears to have passed between the parties is that their minds met presently in agreement, as plaintiff claims, a valid contract was made, whatever may have been the verbal expressions used, was not prejudicially erroneous because of the use of the words "natural inference" instead of "reasonable inference." *Ibid.*

12. Nor was such instruction erroneous on the ground that the jury might have supposed therefrom that they were permitted to find that a contract was made inconsistent with the words used by the parties. *Ibid.*

Verdict. See APPEAL, 16, 17. LANDLORD AND TENANT, 3. MASTER AND SERVANT, 16, 19. NEGLIGENCE, 4.

13. Where the questions submitted for special verdict were appropriate and covered the issues, a party cannot complain because

they differed in form and phraseology from those requested by him. *Redepenning v. Rock*, 372

14. Questions relating to mere evidentiary facts should not be submitted in a special verdict. *Blankavag v. Badger B. & L. Co.* 380

15. Where a special verdict covers in some reasonable form all material controverted issues of fact, the fact that some questions therein are immaterial and that others do not, each by itself, cover a distinct issue, is not prejudicial. *Twentieth Century Co. v. Quilling*, 481

16. Where at the trial counsel object to the form of the special verdict in one particular only, they will be deemed to have waived other objection to such form. *Ibid.*

Same: Changing answers.

17. The court cannot change the answer to a question in the special verdict if there is any credible testimony to support it. *Maxon v. Gates*, 270

Findings of fact by court. See APPEAL, 18–20, 24.

18. A recital in the judgment that allegations of the complaint had been established by the undisputed evidence is *held* sufficient as a finding of facts, although the practice is not approved. If defendant desired a more particular finding he should have requested it. *Maxon v. Gates*, 270

19. A specific finding of fact should be held to be controlling over another finding which is a mere recapitulation in figures of conclusions from facts previously found, where there is an evident clerical error or discrepancy in such figures. *Phalen v. Hershey L. Co.* 571

TROVER AND CONVERSION. See ACTION.

TRUST COMPANIES. See TAXATION, 3.

UNDUE INFLUENCE. See WILLS.

UNIFORMITY.
In town and county government. See TAXATION, 6.
In rule of taxation. See TAXATION, 7.

UNITED STATES: Powers of Congress. See COMMERCE. INDIANS, 1.

UNLAWFUL DETAINER. See LANDLORD AND TENANT, 4.

USAGE AND CUSTOM. See MASTER AND SERVANT, 2, 20, 29, 32, 33. STREET RAILWAYS, 3.

USURY.

1. The fact that the lender's son, who acted as her agent in making a loan of money, did not receive any compensation from her, did not raise a conclusive presumption that she knew he exacted from the borrower a commission in addition to lawful interest for the loan. *Franzen v. Hammond*, 239

2. The exaction, by the lender's agent from the borrower, of a commission or bonus for himself, which, with the interest charged, exceeds the lawful rate of interest, does not make the loan contract usurious as to the lender, if such exaction was without his participation or knowledge. *Ibid.*

3. The exaction of usury is not within the apparent scope of an agency to make loans. *Ibid.*

4. The receipt by the lender of a security regular upon its face, and assertion of a right to enforce it according to its tenor, do not constitute ratification of any act of the lender's agent in violation of law. *Ibid.*

VALUE of land. See VENDOR AND PURCHASER, 7, 9–13.

VENDOR AND PURCHASER OF LAND.

Treating timber as personalty: Consent of both parties: Oral agreement: Replevin.

1. When, by consent of the vendor and vendee in a land contract, who together own the whole title, the timber on the land is severed therefrom, it may be dealt with as personal property. *Rohrer v. Lockery,* 532

2. So *held* in a case where the timber was cut by the vendee and the logs delivered at the mill of a third person under an oral agreement that the vendor should have them sawed into lumber and sell it and apply the net proceeds upon the purchase price of the land. *Ibid.*

3. Even if such oral agreement was invalid, under the statute of frauds, as an executory contract, it might be considered as indicating the meaning and purpose of the delivery of the logs at the mill. *Ibid.*

4. Delivery of the logs at the mill for the purpose mentioned would vest in the vendor of the land possession and a special property sufficient to enable him to maintain replevin against a stranger taking the logs. *Ibid.*

Construction of agreement to convey.

5. Although a written agreement to convey land is in some respects indefinite or ambiguous, if, by aid of evidence showing the situation and surroundings of the parties at the time and their subsequent acts, if any, construing the terms of the writing, the court can with reasonable certainty determine the meaning intended by the parties, the contract will not be allowed to fail, but will be construed in the light of such evidence and will be enforced as so construed if there is no other fatal objection to it. *Inglis v. Fohey,* 28

Performance of contract. See SPECIFIC PERFORMANCE.

6. A finding that plaintiff had been at all times ready and willing to perform on his part a contract for the conveyance of lands to him, is *held* to be sustained by the evidence. *Maxon v. Gates,* 270

7. In an action for breach of a contract to convey lands, evidence that after the contract was made defendant had conveyed certain of said lands to other parties was admissible as bearing upon the intention of defendant to repudiate the contract and also as showing the value of the lands from the consideration stated in the deeds. *Ibid.*

Breach of contract: Damages: Evidence.

8. In an action for breach of a contract to convey a large quantity of lands—some by quitclaim deeds and others by warranty deed subject to incumbrance—the measure of plaintiff's damages is the difference between the price agreed to be paid and the actual value of the lands at the time of the breach, if sold in a body, subject to outstanding incumbrances, to one ready

and willing to buy; such damages to be ascertained with reasonable certainty as the natural result of the breach and as within the probable contemplation of the parties at the time the contract was entered into. *Ibid.*

9. The "market value" of land is the price that would in all probability result from fair negotiation where the seller is willing to sell and the buyer desires to buy; and the expressions "actual value" and "market price" mean the same thing. *Ibid.*

10. Evidence of sales made at or about the time of the breach of a contract to convey lands is admissible as bearing upon the actual value, when it appears that there has been no sudden change in conditions. In this case too much weight is *held* to have been given to evidence of sales made a year or more after the breach and after there had been a decided advance in values. *Ibid.*

11. The value of the lands in small parcels should not in such a case be taken as the basis of damages, since that would be greater than their value in a body and neither party could have contemplated a resale in small parcels within a short time. *Ibid.*

12. Upon the evidence in this case it is *held* that the fair market value of the large quantity of lands which defendant held by tax titles and was to convey to plaintiff by quitclaim deed was $1.75 per acre. *Ibid.*

13. Although a tax deed fair upon its face is *prima facie* a marketable title, yet, it being matter of common knowledge that a tax title is not as acceptable to the ordinary purchaser as an original title, it was proper for the court, in determining the amount of damages for breach of a contract to convey by quitclaim deed lands held by tax titles, to make a deduction for diminution in value on that account; and a deduction of fifteen cents per acre is *held* reasonable in this case. *Ibid.*

Rescission of contract: Fraud or mistake of agent.

14. Where a person employed to procure a purchaser for land points out the wrong land to intending purchasers, whether by fraud or by mistake, and they purchase in the belief that they are getting the land shown, the consideration paid may be recovered, although the vendor did not know, when it was paid, that the agent had shown the wrong land. *Stelting v. Bank of Sparta,* 369

Dower rights of vendor's wife. See DOWER.

VENUE.

See APPEARANCE.

1. The right to a change of the place of trial from one court to another is statutory and can be enjoyed only as prescribed by the written law. *Goyke v. State,* 557

2. Ch. 24, Laws of 1895, provides for a change of venue from the municipal court of the city of Oshkosh and county of Winnebago in criminal cases only; and a change of venue from that court in a bastardy case cannot confer jurisdiction upon the circuit court for Winnebago county, even though the change is made upon the application of the accused and he thereafter submits without objection to trial in the circuit court. *Ibid.*

VERDICT. See TRIAL, 13–17.

VILLAGES: Regulating saloons: Delegation of power. See CONSTITUTIONAL LAW, 12–14.

WAIVER.

1. One who does some positive act which, according to its natural import, is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it. *Swedish American Nat. Bank v. Koebernick*, 473

2. Where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law. *Ibid.*

Of right to appeal. See APPEAL, 5, 6.
Of objection to evidence. See APPEAL, 9.
Of objections to verdict. See APPEAL, 16, 17.
Of insufficiency of affidavit. See ATTACHMENT, 2.
Of lack of jurisdiction. See COURTS, 1.
Of objections to juror. See CRIMINAL LAW, 2.
Of insufficiency of notice. See DEPOSITIONS.
Of fraud inducing contract. See ELECTION OF REMEDIES.
Of rules. See RAILROADS, 35.
Of agreement for substitution of notes. See SALES, 3.
Of tender or demand. See SPECIFIC PERFORMANCE, 3.
Of objections to form of verdict. See TRIAL, 16.
Of lack of findings. See TRIAL, 18.
Of objection to jurisdiction. See VENUE, 2.

WARRANTY. See SALES, 4–6.

WASTE. See MORTGAGES, 3.

WATERS.

Navigable waters. See DRAINS, 2–5.

1. It is the policy of this court scrupulously to protect the navigable waters of the state from impairment. *In re Horicon D. Dist.* 227

2. Rock river is navigable in law and a public river of the state up to township 14, range 15. *State v. Carpenter*, 65 Wis. 165, limited and distinguished. *Ibid.*

Water supply. See MUNICIPAL CORPORATIONS, 6.

WILLS.

A finding by the trial court that a will was the product of undue influence on the part of the sole devisee is *held* to be sustained by the evidence. *Carney v. Carney*, 91

WITNESSES.

Competency. See EVIDENCE, 11, 12.

1. In an action by an administratrix upon notes given to her intestate, the defendant was incompetent, in the first instance, under sec. 4069, Stats. (1898), to testify to a transaction or communication personally had with the intestate; but when the plaintiff, in rebuttal, examined witnesses as to such a transac-

tion, defendant's disqualification or incompetency as to that particular transaction was removed and he had the right to testify concerning the same on surrebuttal. *Anderson v. Anderson,* 328

2. The ordinary rule as to the order of proof, being a mere rule of convenience, must in such a case yield to the rule of the statute, and defendant's testimony should not be excluded on the ground that it is not rebuttal. *Ibid.*

3. The competency of a stockholder of a corporation to testify as a witness was not, under any circumstances, affected by sec. 4069, Stats. (1898), prior to the amendment thereof in 1907. *Johnson v. Fraternal Reserve Asso.* 528

4. Under sec. 4069, Stats. (1898), originally, an officer or stockholder of a corporation was not included in the designation "party" nor to be considered as such by reason of the corporation being a party. *Ibid.*

Examination. See APPEAL, 23. EVIDENCE, 13.

5. The extent to which leading questions may be put is very largely in the discretion of the court; and such discretion is *held* not to have been exceeded in this case by allowing such questions to be asked of an illiterate witness imperfectly familiar with the English language. *Kozik v. Czapiewski,* 70

Cross-examination. See HIGHWAYS, 8, 11.

Credibility, impeachment, corroboration, etc. See TRIAL, 4, 5.

6. It was competent for the defense on a murder trial to show that a witness for the state was intoxicated at the time of the homicide, in order to discredit his testimony; but evidence that he was intoxicated an hour and a half later was properly excluded as immaterial. *Pollock v. State,* 136

7. Where a witness has wilfully testified falsely as to any material fact, the jury may disregard all his testimony except as it may be corroborated by other credible evidence. *Blankavag v. Badger B. & L. Co.* 380

8. Testimony that an expert witness had, prior to the trial, intimated in certain conversations that if he were paid for his time and expenses by either party he would, if necessary, testify falsely for such party, was not competent to impeach such witness until foundation had been laid therefor by asking the witness specifically whether he had made such a statement, specifying details and calling attention to time, place, and occasion. *Ferguson v. Truax,* 637

WORDS AND PHRASES.

Actual value. See VENDOR AND PURCHASER, 9.
Actually taken, in statute. See CHATTEL MORTGAGES.
Authorities of town. See TAXATION, 5.
Business transacted in this state, in statute. See CORPORATIONS, 17, 18.
Clear and satisfactory evidence, in statute. See RAILROADS, 13.
Conversion, in contract. See ACTION.
Declared carried, in record of meeting. See COUNTIES, 1.
Due process of law, in constitution. See TAXATION, 9.
Free on board cars, in contract. See SALES, 2.
Heat of passion, in statute. See HOMICIDE, 1.
In any wise come in question, in statute. See JUSTICES' COURTS.
In lieu of all taxes, in statute. See TAXATION, 3.

Insufficiency or want of repair, in statute. See MUNICIPAL CORPORATIONS, 2.
Jeopardy. See CRIMINAL LAW, 1.
Manner of taxation, in statute. See TAXATION, 2.
Market price. See VENDOR AND PURCHASER, 9.
Market value. See VENDOR AND PURCHASER, 9.
Matters civil and criminal, in constitution. See BASTARDY, 1.
Mistake, in statute. See TRESPASS.
Natural inference, in instruction to jury. See TRIAL, 11.
Ordinary care. See NEGLIGENCE, 1.
Party, in statute. See WITNESSES, 4.
Pay for all labor, etc., in bond. See SCHOOLS, 3.
Place of public accommodation or amusement, in statute. See CIVIL RIGHTS, 2.
Premeditated design, in statute. See HOMICIDE, 1.
Property, in statute. See TAXATION, 1.
Real party in interest, in statute. See CORPORATIONS, 8, 9.
Reasonable. See CONSTITUTIONAL LAW, 18, 19.
Reasonable rate or service, in statute. See RAILROADS, 10, 18(2), 19(2).
Reasonable time for removal of baggage. See RAILROADS, 28, 29.
Relief granted to the plaintiff, in statute. See MARRIAGE AND DIVORCE, 6.
Rights of flowage, in statute. See DRAINS, 3.
Riparian rights, in statute. See DRAINS, 3.
Sale of chattels, in statute. See FRAUDS, STATUTE OF, 4.
Served the notice, etc., in pleading. See LANDLORD AND TENANT, 5.
Uniform system of town government, in constitution. See TAXATION, 6.
Unlawful, in statute. See RAILROADS, 15, 16.
Unreasonable, in statute. See RAILROADS, 11, 15, 16.
Use of the street, in statute. See STREET RAILWAYS, 1.
Water powers, in statute. See DRAINS, 3.

WRITS to be used in exercise of power of superintending control. See COURTS, 4, 10, 13, 14.

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HARVARD LAW